NO. 79

In the Supreme Court of the United States

OCTOBER TERM, 1949

JULIA RHODA AARON AND ALL OTHER PLAINTIFFS AND INTERVENERS LISTED IN THE COMPLAINTS AND INTERVENTIONS IN THE DISTRICT COURT IN CIVIL ACTION NO. L. R. 1584, CONSOLIDATED,

Petitioners,

vs.

FORD, BACON & DAVIS, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

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The Record

The record in this case is printed as a single volume in three sections, each carrying its own pagination. The first section consists of the abstract of record filed by petitioners in the Court of Appeals, in which they printed some and summarized other parts of the original transcript of record of the proceedings in the District Court which had previously been filed in the Court of Appeals. That abstract is referred to as "the Record" and will hereinafter be cited as "R.". The second section consists of portions of the original transcript (including some which petitioners had undertaken to summarize in their abstract) which were printed by respondent for the consideration of the Court of

Appeals. These portions of the original transcript are referred to as "the Supplemental Record" and will hereinafter be cited as "S. R.". The third section consists of the proceedings in the Court of Appeals and will hereinafter be cited as "App. R.". The case was heard below on both the Record and the Supplemental Record (App. R. 6, 35) in accordance with the practice prevailing in the Eighth Circuit.[1]

The Opinions Below

The brief opinion of the District Court is embodied in the order for summary judgment entered on August 15, 1947 (R. 56-58). In that order, the District Court adopted the opinion which it had previously filed in the case of *Barksdale v. Ford, Bacon & Davis, Inc.*, 70 F. Supp. 690, (E. D. Ark. 1947). The opinion of the Court of Appeals is printed in the record (App. R. 8-9) and reported in 174 F. (2d) 730. It accepts as controlling the opinion filed by the same court on the same day in the case of *United States Cartridge Co. v. Powell, et al.*, which is printed in the record (App. R. 10-33) and reported in 174 F. (2d) 718.

Jurisdiction

The judgment of the Court of Appeals was entered on April 12, 1949 (App. R. 33). The petition for certiorari was granted on June 27, 1949, 337 U. S. 955. The jurisdiction of this court is invoked under Section 1254 of the Revised Judicial Code (28 U. S. C. 1254).

Questions Presented

1. Did the coverage of the Fair Labor Standards Act extend to those who, during the recent war, were engaged

[1] See Rule 11 of the Rules of the Court of Appeals for the Eighth Circuit.

in the production of munitions at Government-owned ordnance plants operated through the agency of private contractors by authority of the National Defense Act of July 2, 1940?

2. Were such persons engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act?

3. Were such persons "employees" within the meaning of the Fair Labor Standards Act?

4. Does the Portal-to-Portal Act of 1947 bar petitioners' claim?

Statutes Involved

The statutes involved are the Walsh-Healey Public Contracts Act of June 30, 1936 (c. 881, 49 stat. 2036; 41 U. S. C. §35, et seq.), the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. §201, et seq.),[2] the National Defense Act of July 2, 1940 (c. 508, 54 Stat. 712, 50 U. S. C. App. §§1171, 1172, and 5 U. S. C. §189(a)), and the Portal-to-Portal Act of 1947 (Act of May 14, 1947, c. 52, 61 Stat. 84, 29 U. S. C. §251, et seq.). The pertinent provisions of these Acts are so extensive that for convenience they are printed as Appendix A of this brief (infra pp. 95-108).

Statement of the Case

The Government has intervened as *amicus curiae* in this case as well as in *Creel v. Lone Star Defense Corporation*, No. 58, October Term, 1949, and *Powell v. The United*

[2] The Fair Labor Standards Act was amended by the Act of October 28, 1949 (c. 736, Public 393, 81st Cong. 1st Sess.). To the extent that the new amendments are pertinent, they will be set forth in the course of the argument.

States Cartridge Company, No. 96, October Term, 1949, and has filed a consolidated brief in which it is said that the "salient facts. * * * are concededly substantially similar in all three cases. * * * The contracts, employment relationships and methods of operation in all three cases were substantially the same. The three records together afford a complete and representative picture of the operation and relationships." With these statements we agree, but anyone familiar with the record in this case would hardly recognize the Statement of Facts which appears in the Government's brief.

The explanation is that the Solicitor General has attempted to construct a synthetic case, first, by dipping into all three records and extracting from them certain facts which create an impression favorable to petitioner's claims, and, second, by quoting extracts from a publication (not to be found in any of the three records) which sets forth at length the conclusions of the writer on certain questions which are pertinent here. Although, as we shall see (infra, pp. 18, 19), this publication never pretended to be an authoritative expression of War Department views, and although it was later superseded by official statements emanating from higher sources, the Government relies on it to establish facts for which no support can be found in these records. *At the same time, the careful and comprehensive findings of the trial court in this case are simply ignored.*

Those findings, which completely contradict many important statements to be found in the Government's brief, were originally made after trial on the merits of a suit brought against this respondent by a fellow employee of petitioners (R. 58-64). When the present suits came on for trial before the same judge, in order to save time the testi-

mony in the earlier case was summarized in affidavit form and presented on motion for summary judgment. In the order granting that motion, the trial court expressly adopted the findings in the earlier case (R. 57). These findings, which were made by an experienced trial judge and not disturbed by the Court of Appeals, relieve this court of the necessity of searching through thousands of pages of the records in these three cases in order to arrive at the "salient facts". They present a picture which is typical of many similar operations undertaken by the Government as a part of its program of war production and afford a solid basis for consideration and disposition of the issues raised in all three of the cases now before this court.

The Proceedings Below

This suit was brought in the District Court of the United States for the Eastern District of Arkansas. The petitioners alleged that they had been employed in the Arkansas Ordnance Plant as handlers, carriers, and processors of explosives, or as line leaders and assistant line leaders on production lines or as operators whose duties were to handle, make, load, assemble, process and produce items of ordnance in that plant (R. 4). They charged that they "were compelled by the necessities of the defendant's business, by the physical arrangement of the Plant, by the productive aims of the defendant, and by instructions of the defendant to perform work and labor for and to be upon the premises controlled, maintained and operated by the defendant for approximately thirty-five (35) minutes prior and thirty (30) minutes subsequent to the scheduled work hours each work day for which they were not compensated. *This action is to recover compensation for such work, labor and time*" (R. 5). [Italics supplied.].

The complaint alleged that petitioners were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 and that they had a cause of action for overtime wages due to them under the provisions of that act (R. 4). Respondent answered, denying that it was engaged in the production of goods for commerce or that petitioners were engaged in commerce or in the production of goods for commerce (R. 14). The answer stated further that petitioners were employees of the United States within the meaning of the Act, that the activities on which petitioners based their claim were preliminary and postliminary to their regular hours of work and were not compensable by express provision of any written or unwritten contract in effect at the time of their employment or by any custom or practice in effect at such times at the Arkansas Ordnance Plant, and that respondent in making payment to those employed at the Arkansas Ordnance Plant had relied in good faith on regulations, orders and rulings of the Ordnance Department (R. 14-15). Other defenses not material to this appeal were likewise asserted (R. 15). All allegations of the complaint not specifically admitted were generally denied (R. 14).

Respondent then filed a motion for summary judgment (S. R. 1) on the following grounds:

> "(a) That the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of those terms as used in the Fair Labor Standards Act; and
>
> "(b) That the plaintiffs were employees of the United States and as such were not covered by the Fair Labor Standards Act; and
>
> "(c) That, by virtue of the provisions of the Portal-to-Portal Act of 1947, the plaintiffs may not recover herein."

This motion was supported by numerous affidavits and exhibits (S. R. 2-124).[3] Petitioners served on respondent written requests for the admission of certain facts, to which respondent made written answer (S. R. 124-135). Thereafter petitioners propounded written interrogatories to respondent, to which replies were made under oath (S. R. 136-171). Petitioners then filed a response to the motion for summary judgment with accompanying affidavits (R. 41-52).

The case came on for hearing in the District Court which, after considering "the pleadings in the action, the affidavits in support of the motion filed by the defendant, the affidavits opposing the motion filed by the plaintiffs, the admissions of fact made by the defendant pursuant to the request of the plaintiffs under Rule 36 of the Federal Rules of Civil Procedure, [and] the responses to interrogatories propounded to the defendant by the plaintiffs, pursuant to Rule 33 of the Federal Rules of Civil Procedure. * * * and upon the statement of counsel for the defendant that the affidavits in opposition to the motion raised disputed questions of fact in connection with the applicability to this action of the Portal-to-Portal Act of 1947, and upon the statement of counsel for plaintiffs that the affidavits filed by the plaintiffs in opposition to the motion raise no controverted questions of fact" found that "there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial court in connection with the first alleged ground for summary judgment" (R. 56-57).

[3] The motion for summary judgment and supporting affidavits and exhibits, petitioners' request for admission of facts and answer of respondent and petitioners' interrogatories and respondent's replies thereto are all inadequately summarized in the abstract filed by petitioners in the Court of Appeals (R. 17-41, 53-56). For this reason reference is made to the pages of the Supplemental Record where the relevant parts of those documents appear in full.

The court found further that "the facts in this case concerning the grounds set forth in paragraph 1 (a) of the motion for summary judgment are substantially the same as the facts in the case of *Barksdale v. Ford, Bacon & Davis, Inc.*, Civil Action No. L. R.-1323 in this court, and the court adopts the opinion filed by it in said cause No. L. R.-1323 as its reasons for the entry of this judgment in so far as the reasons assigned in said opinion are applicable here, and orders that a copy of said opinion be filed herein and made a part of the record in this case." The court then stated as a conclusion of law that petitioners were not engaged in commerce or in the production of goods for commerce and, declining to pass on any other issue raised in the motion for summary judgment, ordered that the action be dismissed (R. 57-58).

Petitioners appealed from this order to the Court of Appeals for the Eighth Circuit. The Agreed Statement filed by counsel for petitioners and respondent in the Court of Appeals recited that at the hearing in the District Court "counsel for plaintiffs stipulated that the affidavits in opposition to the motion for summary judgment raised no disputed issues of fact" (R. 2). The case was first argued before the Court of Appeals prior to the announcement of the opinion of this Court in *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948). After that case had been decided, the Court of Appeals set aside the submission of the present case and set it for reargument before the court *en banc*. The parties were granted leave to file supplemental briefs "particularly directed to the applicability, if any, of either the Fair Labor Standards Act of 1938 * * *; the Act of July 2, 1940 * * *; or the Walsh-Healey Public Contracts Act * * *" (App. R. 11). On reargument, all seven judges of the Eighth Circuit concurred in affirming the order of the trial court. The court adopted

as controlling its own decision in the case of *United States Cartridge Co. v. Powell*, 174 F. (2d) 718, decided the same day (App. R. 8-9, 10-33).

The Facts

Armed with the authority conferred by the National Defense Act of July 2, 1940,[1] to provide for the construction of "plants, buildings, facilities, utilities and appurtenances thereto" for the manufacture and storage of munitions and to provide for the operation of any such plants, buildings, etc., "*either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them*", the War Department determined to construct at Jacksonville, Arkansas, a new ordnance facility for the loading of fuzes, boosters, primers and detonators. Accordingly, a tract of land containing several thousand acres was acquired in the desired neighborhood.[2] A contract was then

[1] For the citation and text of the relevant parts of the statute see Appendix A, *infra*, pp. 102-104.

[2] Although the complaint alleges that the plant was located upon "an enclosed reservation containing several thousand acres", we have been unable to find in the record any reference to the exact size of the plant. In this connection, however, the following passage from a speech delivered by Colonel T. C. Gerber, Field Director of Ammunition Plants, before the Engineers' Club of St. Louis and the St. Louis Section of The American Institute of Mining and Metallurgical Engineers on the 16th of March, 1944, may be of interest:

> "Many of you may have visited TNT plants or loading plants. Those of you who have not, would probably be most impressed by the immense size of the area each covers, and the widely separated manner in which buildings are laid out. Both TNT and loading plants consist of lines or groups of buildings scattered over an area which in some cases is as great as 20,000 acres. None of the buildings are of great size, and most are of special construction, so that if an explosion should occur, damage to both personnel and property would be limited by distance and the lightness of the missiles."

entered into with the respondent for the design, construction and equipment "upon a site to be furnished and made available by the Government" of a plant consisting of "loading buildings, administration buildings, shops, railroads, roads, steam lines, air lines, electric lines, telephone lines, fencing, lighting, power house, dormitories, water and sewer systems, staff dwellings, messhall, cafeterias, guard quarters, fire fighting equipment and housing thereof, and other buildings and equipment necessary or appropriate for a loading plant of the approximate capacity aforesaid, with storage buildings adequate for about 30 days' supply of incoming materials and about 60 days production of finished product" (S. R. 25).

For reasons which have been fully explained in statements made since that time,[1] the War Department had come to the conclusion that the managerial skill of respondent's organization might be needed in the vast program of munitions production which Congress had authorized. Accordingly, the contract gave the Government the option to call on respondent to operate the plant once it had been constructed and equipped, and to train key personnel for that purpose. The provisions of the contract applicable to the operation of the plant are found in Titles IV to VII, inclusive, and it is with these, and these only, that we are concerned in the present case. *It should be emphasized that Titles I through III, inclusive, have no bearing on the present case.* Thus the provisions of Titles I-F and I-G are, by their express terms, limited to the work done under that particular title, that is to say, to the work of design, engineering and construction (S. R. 25,

[1] See Campbell, "The Industry Ordnance Team", pages 101 and following. See also the report of Representative Albert J. Engel published in Army Ordnance Report No. 6, August 21, 1944, under the title "Ordnance Ammunition Production".

33-36). Similarly, the provisions of Article II-D and Article III-D have application only to work done in connection with the procurement of production equipment and the training of key personnel necessary for the operation of the plant (S. R. 38-39).

The essential features of the arrangement between the respondent and the Government are described in the comprehensive findings of fact of the trial court (R. 60-64). From these findings the following facts appear:

1. The Arkansas Ordnance Plant was a military reservation owned by the United States over which the United States had acquired exclusive jurisdiction. The entire plant was at all times under the command of an ordnance officer who exercised full and complete control over the property and the installations thereon. (See paragraphs 6, 21 and 22 of the Findings of Fact (R. 60, 62)).

2. The plant was designed for and was used exclusively in the manufacture of munitions used by the Government in the prosecution of the war. (See paragraph 14 of the Findings of Fact (R. 61)).

3. All munitions manufactured or processed at the Arkansas Ordnance Plant were manufactured or processed under the direct supervision and control of the Government. The Government specified the manufacturing processes to be used. It directed the type and quantity of munitions, the specifications thereof, and the rate of production. Inspections were made by the Government during each step of their manufacture or processing. Detailed rules and regulations governing safety and methods of production were promulgated by the Government. Respondent was required to comply with these rules and regulations, and Government-paid employees were present to report on compliance. The Government, from time

to time, sent to the respondent production schedules directing the respondent to produce munitions of certain designated specifications. The respondent was required to meet these schedules. It had no discretion as to the type of munitions to be made, the quantity thereof, or the method or process used in their manufacture, and the respondent produced no munitions except as requested by Government directive. On occasion the Government transferred production schedules from other ordnance plants to the Arkansas Ordnance Plant for completion. In such cases, if the original plant had made any contracts for materials and supplies on account of such schedules, the respondent was required to take over such supply contracts and to pay the vendors in accordance therewith from Government funds. (See paragraphs 25, 26, 27 and 28 of the Findings of Fact (R. 62-63)).

4. The Government did not purchase from the respondent nor did the respondent sell to the Government the munitions produced at the plant. The respondent had no financial stake in the contract. The Government agreed to bear all the costs, and all expenditures were made from a fund advanced by the Government. In addition, the respondent was paid a fixed fee in monthly installments. This fee was not dependent upon the quantities produced, nor was the respondent penalized if materials manufactured or processed at the plant did not meet specifications and could not be used. The contract specifically provided that the respondent should be allowed all costs of reworking rejected munitions and all costs of material finally rejected. (See paragraphs 12, 13 and 19 of the Findings of Fact (R. 61) and Article V-B-3(d) of the contract between respondent and the Government (S. R. 54)).

5. The wage policies of the respondent were determined by the Government, primarily through the com-

manding officer at the plant. Before a single dollar was paid in wages, the respondent was required to submit to the commanding officer a job classification and wage rate schedule. After approval, the respondent was required to comply literally with this schedule. The commanding officer could discharge any employee and could approve or disapprove the hiring or firing of any employee. The hiring of every employee and all changes of status, either in classification or wage rate, had to bear the written approval of the contracting officer. Checkers were maintained in clock houses where employees reported in, and the Government audited and approved the time cards. The Government even maintained men to observe payroll payments to the employees. (See paragraphs 23, 24 and 32 of the Findings of Fact (R. 62-63)).[7]

6. The Government supplied all the component parts of the products with which the employees at the Arkansas Ordnance Plant were required to deal. It also supplied approximately 95% of the materials, supplies, machinery, equipment and other property used in connection with the contract for the operation of the plant. The purchase of the balance of such materials, supplies, machinery and equipment and other property was effected through the agency of the respondent, with the prior approval of rep-

[7] See paragraph 8 of the Statement of Labor Policy printed as Appendix B to this brief. This Statement was implemented from time to time by appropriate instructions issued by the Office of the Chief of Ordnance. These Ordnance Procurement Instructions (hereinafter referred to as OPI) were given wide public circulation and may be found in the services published during the war by Commerce Clearing House, Inc., and the Prentice-Hall Corporation. Excerpts from these instructions are printed in the record (S. R. 76-78, 163-164). As to the statements made in paragraph 5 above, see OPI 9107, et seq. See also decision of Comptroller General, B-22235 dated December 19, 1941, 21 Dec. Comp. Gen. 593.

resentatives of the Government. (See paragraphs 9, 15, 30 and 31 of the Findings of Fact (R. 60, 61, 63)).

7. All items furnished by the Government were shipped to a Government representative at the plant on Government bills of lading as the property of the United States "for military use". Items purchased through the agency of the respondent were likewise shipped to a Government representative at the plant on Government bills of lading marked "Government Property for Military Use", and the Government took title to such items at their point of origin. The Government maintained an accountable property officer who was accountable for all property used in connection with the contract for the operation of the Arkansas Ordnance Plant from the time of the arrival of such property at the plant. (See paragraphs 9, 15, 18 and 31 of the Findings of Fact (R. 60, 61, 63)).

8. The title to the land, buildings, machinery, equipment, materials, supplies and all other property used in connection with the contract for the operation of the Arkansas Ordnance Plant, as well as the title to all finished products produced at that Plant, was at all times in the Government. (See paragraphs 8, 10, 11 and 17 of the Findings of Fact (R. 60-61)).

9. Not only did the Government at all times have title to all the property used in connection with the contract as well as the finished products produced at the Arkansas Ordnance Plant, but it at all times had actual physical possession thereof. (See paragraphs 9, 10, 11, 17 and 31 of the Findings of Fact).[8]

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[8] The record amply supports the findings of the trial court on this point. All supplies, materials, components and other property used in connection with the contract were shipped to a Government officer at the plant, usually on Government bills of lading (S. R. 4-11). Where

10. The finished products of the Arkansas Ordnance Plant were shipped by the Government under Government bills of lading to military facilities beyond the State of Arkansas for use by the armed forces of the United States in the conduct of the war. Some shipments went directly overseas and others went to military facilities located within the United States. (See paragraph 10 of the Findings of Fact (R. 60)).

It will be noted that the trial court made no findings with respect to the respondent's contention that the claim of petitioners was barred by the Portal-to-Portal Act of 1947.[9] Certainly, the allegations of the complaint fail to allege the existence of any contract or custom calling for payment for time spent in such activities as are described in the complaint (R. 5-12). The affidavit of W. F. Whittle

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the Government did not supply the property as "free issue", it was purchased only after approval by a Government representative (S. R. 2). As soon as the property arrived at the plant, it was inspected and checked by a Government representative (S. R. 2). If approved by him, it was paid for from Government funds advanced to the contractor, and a Government officer became accountable therefor (S. R. 2, 14). The goods were then processed under constant supervision by the Government (S. R. 4, 14, 15, 20). The affidavit of W. F. Whittle expressly states that "the Government had title to and possession of all property used in connection with the operations of the Arkansas Ordnance Plant" (S. R. 14). After completion, the goods were inspected by a Government representative and if found to be in accordance with specifications were approved for shipment. Government bills of lading were then prepared by or at the direction of a Government representative (S. R. 3, 12). Those bills of lading named a Government officer as shipper and a Government officer as consignee (S. R. 16). The actual physical loading of the vehicles in which the goods were to be removed from the plant was done by persons on the payroll of respondent under supervision of a Government representative (S. R. 3). See in this connection the opinion of the trial court (R. 65-66).

[9] For the citation and text of the relevant parts of this Act see Appendix A, infra, pp. 105-108.

filed in support of the motion for summary judgment expressly denies the existence of any such contract or custom (S. R. 16). Furthermore, there is much in the affidavits to support the contention that the respondent acted in good faith relying on rulings of the Ordnance Department (S. R. 18). However, the affidavits filed with petitioners' response to the motion for summary judgment seemed to raise some questions of fact as to the nature of the work done, and counsel for the respondent so stated to the trial court.[10] Counsel for petitioners disclaimed in the trial court the intention to raise any such issue of fact, and in the agreed statement filed in the Court of Appeals joined in a stipulation to the effect that "the affidavits in opposition to the motion for summary judgment raised no disputed issues of fact" (R. 2). Accordingly, it is submitted that on this record petitioners must be taken to have admitted that respondent paid them in good faith in reliance on rulings of the Ordnance Department and that the activities on which their claim is based were not compensable by express provision of any written or unwritten contract in effect at the time of their employment or by any custom or practice in effect at such time at the Arkansas Ordnance Plant.

[10] This is noted in the order of the trial judge dismissing the complaint (R. 57).

Argument

Introduction

The arguments which follow are made with the full approval of the Department of the Army. In an effort to justify the action of the Department of Justice in supporting the position of the petitioners in these cases, the Solicitor General has attempted to show that the Army has been guilty of inconsistency. To this end no less than twenty-three pages of the Government's brief (pp. 33-55, inclusive) are devoted to quotations from Presidential addresses, pronouncements of the National Defense Advisory Commission, testimony given before Congressional Committees by officials in charge of the defense program, and a variety of publications emanating from sources within the War Department and elsewhere. In order to explain the significance of all of this material, it would be necessary to write an historical treatise far exceeding in length this entire brief. We shall limit ourselves to the general proposition that, with exceptions to be noticed, it has no bearing on the questions at issue here.

What this court has now to decide is whether those Government arsenals which were operated "through the agency of selected, qualified, commercial manufacturers under contracts entered into with them" by virtue of the provisions of the National Defense Act of July 2, 1940, were covered by the Fair Labor Standards Act. That they were covered by the Walsh-Healey Public Contracts Act is conceded. Thus the general principle of overtime compensation for those engaged in war production, (which is the concern of many of the utterances relied on by the Government), is not now drawn in question. That the Fair Labor Standards Act was not inapplicable to war production contracts *as such* was certainly the view generally held by administrative officials throughout the period of World War II. There is also much evidence that those officials did not believe that the Act

was inapplicable to cost-plus-a-fixed-fee contracts *as such*. But these points so strenuously argued by the Government may be conceded without in any way affecting the force of most of the contentions made in this brief. For in the argument which follows, it is nowhere contended that all war production contracts were exempt from the coverage of the Act, nor is it argued that all cost-plus-a-fixed-fee contracts were so exempt. Furthermore, the contentions hereinafter made, except those made under point III, are completely consistent with the idea that many government contracts (including cost-plus-a-fixed-fee contracts) are within the ambit of the Act.

The foregoing statements, it is believed, dispose of all the documents on which the Government relies to establish the inconsistency of the Army except two. One is the "Manual of Instructions for the Administration of Contracts" published by the Office of the Chief of Ordnance in 1941. The other is the Memorandum of Agreement signed on December 23, 1943, by representatives of the War, Navy, Labor, and Justice Departments under which private contractors were directed not to raise the defenses on which respondents are now relying in these cases.

As to the first publication, the observation has already been made that it did not pretend to express the official views of the War Department. This clearly appears from the text of a letter written by the Secretary of War to the Comptroller General on August 25, 1942, where the Ordnance Manual is referred to merely as an expression of the views of the Ordnance Department (see 22 Comp. Gen. Dec. 277). The sole medium for the expression of the official views of the War Department on subjects relating to procurement was the Procurement Regulations published from time to time in the Federal Register.[11] Procure-

[11] See Para. 101, War Department Procurement Regulations, 10 C. F. R. Cum. Supp. §81.101

ment Regulation No. 9, which dealt with the Fair Labor Standards Act, was scrupulously careful to avoid the expression of any opinion as to the application of the statute to Government-owned-privately-operated ordnance plants.[12] Moreover, the Ordnance Manual of 1941 was published before Pearl Harbor. Following the entry of the United States into the war, many provisions of that manual were superseded. In particular, the issuance by the Under Secretary of War and the Assistant Secretary of the Navy on July 18, 1942, of the "Statement of Labor Policy Governing the Government-Owned-Privately-Operated Plants," completely altered the situation in so far as the labor policies applicable to these plants were concerned.[13] The Solicitor General has seen fit to ignore this Statement, perhaps because it so clearly robs of all real significance the Ordnance Manual on which he places such reliance.

As to the Interdepartmental Memorandum of Agreement, the true significance of the War Department's acquiescence in this agreement cannot be understood without a knowledge of many circumstances not disclosed in the brief of the Government. In that connection, the attention of this court is called to the letter dated June 14, 1944, from the Judge Advocate General of the Army to the Attorney General and to the letter of March 26, 1946, from the Secretary of War to the Attorney General, both

[12] See Para. 96(b), War Department Procurement Regulations, 10 C. F. R. 1944 Supp. §8.96(b).

[13] The text of this Statement is considered to be of such importance to the issues presented in this case that it has been reproduced in full as Appendix B to this brief. It was referred to in Ordnance Procurement Instructions printed in the Record (R. 163). According to an article published in the New York Times on July 19, 1942, Messrs. Joseph A. Padway and Henry Kaiser, counsel for the American Federation of Labor, Mr. Lee Pressman, counsel for the CIO, and Mr. Allan S. Haywood, Organization Director of the CIO, participated in the preparation of this Statement.

of which are printed in Appendix C (see pp. 114-123, infra). Those letters explain why the War Department agreed that the Department of Justice should instruct its United States Attorneys to notify contractors not to defend claims of this character on the ground that their employees were not engaged in the production of goods for commerce. That reason was not because the defense was believed by the War Department to lack merit but because it was feared that it would succeed and thereby raise collateral issues which might prove embarrassing in the prosecution of the war.

As to the merits of other defenses, there have been varying expressions ranging from outright disapproval to qualified approval. As these defenses began to find favor with one court after the other, there has been a progressive relaxation of the restrictions which the Department of Justice placed on private contractors. Because of those restrictions, concessions were made (as in the *Creel* and *Powell* cases, for example) which the Solicitor General now cites as evidence that contractors lacked faith in the merits of the defenses hereinafter to be presented. Thus the Department of Justice, having compelled contractors to abandon these defenses, now attempts to rely on that abandonment to prove that the defenses never amounted to anything. In declining to attempt to lift itself by its own boot straps in this way, the Department of the Army hardly deserves to be charged with inconsistency.

Summary of the Argument

I.

The record in this case adequately presents the issues. The trial judge made comprehensive findings of fact based on extensive affidavits. The legal issues were argued and considered by the Court of Appeals in the light of *Kennedy v. Silas Mason Co.*, 334 U. S. 249 (1948).

II.

The coverage of the Fair Labor Standards Act did not extend to those employed in the production of munitions at the Arkansas Ordnance Plant. That plant was, in effect a Government arsenal. It had been constructed by the Government on Government-owned land, jurisdiction over which had been ceded to the United States by the State of Arkansas. The entire tract had been proclaimed to be a military reservation and was at all times under the command authority of a military officer directly responsible to the Chief of Ordnance. The plant was designed for the loading of ammunition and was operated solely for that purpose. While, by virtue of the special authority conferred on the Secretary of War by the National Defense Act of July 2, 1940, the actual operation of the plant was carried on through the agency of a private contractor, control over every phase of that operation remained at all times in the commanding officer.

The inapplicability to such a unique industrial unit of the usual principles governing relations between private contractors and their employees was recognized by those charged with the administration of the munitions program. The policies established by those administrators took such installations as the Arkansas Ordnance Plant wholly outside of the scope of the competitive economy which it was the purpose of the Fair Labor Standards Act to regulate.

III.

The Walsh-Healey Act alone applied to employees at the Arkansas Ordnance Plant. (1) Congress intended that act alone to apply to work done in producing munitions for the Government. Moreover the provisions of the two Acts are wholly incongruous. (2) Con-

gress deliberately refrained from extending the provisions of the Fair Labor Standards Act to the novel form of economic activity authorized by the National Defense Act. By contrast, a proviso added to that legislation in conference extended the coverage of the Walsh-Healey Act to contracts made by negotiation. Doubtless, Congress had in mind those inconsistencies in the provisions of the Walsh-Healey Act and of the Fair Labor Standards Act which led the Court of Appeals to the conclusion that the two acts were mutually exclusive. Those inconsistencies have particular significance in connection with activities of the kind authorized by the National Defense Act and support the conclusion that Congress by implication excluded such activities from the scope of the Fair Labor Standards Act.

IV.

The manufacture in a Government-owned arsenal from Government-owned materials of munitions of war is not the production of goods for commerce within the meaning of the Fair Labor Standards Act, even though the company managing the plant is a private concern acting as such under a contract with the Government. (1) The shipment by the Government of Government-owned munitions of war to military installations is not commerce within the meaning of the Fair Labor Standards Act. It is more in the nature of an administrative act of the Government which lacks the essential characteristics of those commercial activities which it was the purpose of Congress to regulate. The prosecution of a war is not commerce. (2) The ammunition thus produced is not "goods" in the sense that that word is used in the Act. Section 3(i) of the Act excepts from the definition of "goods" "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a pro-

ducer, manufacturer or processor". The Government was the "ultimate consumer" of the ammunition produced at the Arkansas Ordnance Plant. The materials and components from which that ammunition was made were at all times in the actual physical possession of the Government; the completed ammunition was inspected by the Government, accepted or rejected by the Government, and stored or shipped by the Government to military installations. Thus petitioners were working on the goods after they came into the actual physical possession of the ultimate consumer. Furthermore, the provisions of Section 3(i) were designed to exclude local enterprise from the ambit of the Act and were expressly intended to apply to the manufacturer of goods delivered to ultimate consumers prior to crossing state lines. Since the ultimate consumer was in actual physical possession of these goods prior to their delivery across state lines, it follows that petitioners are not covered by the Act.

V.

Paragraphs (d) and (e) of Section 3 of the Fair Labor Standards Act exclude employees of the United States from the coverage of the Act. This exclusion was intended to exempt all those employees whose compensation was controlled by the Government. Such employees were not among those for whose benefit the Act was designed, as they were not subject to the pressure of unfair competitive conditions. By a variety of methods, the Government could and did protect these employees against exploitation. The fact that arrangements for their employment were made by a private contractor managing a plant is not controlling in view of the extent of Government supervision over their activities.

VI.

The Portal-to-Portal Act of 1947 affords a complete defense to petitioners' claim. The complaint shows that the work for which recovery was sought consisted of activities before and after scheduled working time. The affidavits supporting the motion for summary judgment denied the existence of any contract or custom that such activities should be compensated. Furthermore, the affidavits establish the good faith reliance by respondent on rulings of officials of the Ordnance Department. The petitioners have stipulated that there is no dispute as to these facts.

I.

THE RECORD ADEQUATELY PRESENTS THE ISSUES

Kennedy v. Silas Mason Co., 334 U. S. 249 (1948) came to this court under peculiar circumstances. The respondent in that case had filed a motion for summary judgment supported by a single affidavit only two printed pages in length. Aside from the motion and its supporting affidavit, the record consisted merely of the contract between the respondent and the government and the opinion of the lower courts. The record was wholly barren of any findings of fact. Moreover, in the Court of Appeals and again in this court, issues were argued which had not been considered below. For all of these reasons, this court declined on that record to pass on the questions sought to be presented.

The present case is wholly different. It is true that the grounds stated in support of respondent's motion for summary judgment in the trial court made no reference to the National Defense Act of July 2, 1940, or to the Walsh-Healey Act, nor does it appear that any argument was

made to the trial court based on the provisions of those acts. However, the motion for summary judgment was supported by voluminous and informative affidavits, and these were supplemented by respondent's answers to requests for admission of fact and to interrogatories propounded to it by petitioners. The trial judge made comprehensive findings of fact which cover every aspect of the case and afford a solid basis upon which to dispose of all of the issues presented by this appeal (R. 60-64). Moreover, all of those issues were fully presented to and considered by the Court of Appeals when the case was reargued.

Thus this court now has the benefit of the views of all seven judges of the Eighth Circuit on the relationship of the Walsh-Healey Public Contracts Act of 1936, the Fair Labor Standards Act of 1938, and the National Defense Act of July 2, 1940. Accordingly, it is submitted that the issues upon which this court declined to pass in the *Silas Mason Company* case are now ripe for decision and that the record in the present appeal presents an appropriate opportunity for this court to dispose of them.

II.

The National Defense Act Set Up a Wholly New System of War Production Which Was Completely Outside the Scope of the Fair Labor Standards Act

Chief Justice Vinson has recently reminded the Bar that this court does not "make a fortress of the dictionary" and has therefore consistently refused "to pervert the process of interpretation by mechanically applying definitions in unintended contexts". *Farmers Irrigation Co. v. McComb*, 337 U.S. 755 (decided June 27, 1949). It is hard to conceive of a case to which these words have clearer application than that presented by this appeal.

Petitioners invoke the provisions of a statute passed in 1938 to make effective "the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows".[14] They seek to apply those provisions to the production, in what is, in effect, a government arsenal, of munitions of war intended for the use of the armed services. It is scarcely conceivable that this is a "meaning that at the particular time and place and in the setting of a particular statute might reasonably have acceptance by men of common understanding".[15]

Viewed as part of the whole texture of laws and of the economy to which they apply, the limits of the area which the Fair Labor Standards Act was intended to cover become clear. The general purpose of federal wage and hour legislation is readily apparent from the legislation introduced and enacted as a result of the depression of the 1930's. The hearings before Congressional committees held in connection with the proposed 30-hour week bills,[16] The National Industry Recovery Act,[17] the Ellenbogen Bill for the regulation of the textile industry,[18] the First Guffey Coal Act,[19] and the Fair Labor Standards Act itself are replete with statements as to the unfair competitive ad-

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[14] Mr. Justice STONE, speaking for this court in *United States v. Darby*, 312 U. S. 100 (1941) at page 115.

[15] Mr. Justice CARDOZO, speaking for this court in *Hale v. State Board*, 302 U. S. 95 (1937) at page 101.

[16] H. R. 14518, 72d Cong., 2d Sess.; H. R. 4557, 73d Cong., 1st Sess.; H. R. 8492, 73d Cong., 2d Sess.; H. R. 7198, 74th Cong., 1st Sess.

[17] 48 Stat. 195.

[18] H. R. 8072, 11770, 12285, 74th Cong., 2d Sess.

[19] 49 Stat. 991.

vantage accruing in interstate markets to employers with lower labor standards.

The first attempt to solve the problem on a broad scale was the National Industrial Recovery Act. When this act was invalidated, Congress determined that it could require proper labor standards at least from those who would do business with the government. It enacted the Walsh-Healey Public Contracts Act, providing that government contracts be awarded only to persons who would comply with certain minimum standards, including minimum wages and maximum hours.

In May, 1937, the President requested Congress to take further action with respect to labor conditions. He pointed out that unrestrained interstate competition produced serious social consequences and recommended that the channels of interstate commerce be closed to goods produced under conditions which did not meet certain standards. The bills which became the Fair Labor Standards Act were introduced.

The major testimony in the extensive Congressional hearings on the bills proves that the heart of the problem, so far as the national economy was concerned, was that goods produced under substandard conditions moved across state lines in competition with other goods and in this manner the substandard conditions were spread.[30]

The committee reports on the bill which became the Fair Labor Standards Act are to the same effect. For example, the House Committee Report, No. 2182, 75th Cong.,

[30] Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess., on S. 2475 and H. R. 7200, pp. 93-95, 111, 127, 134, 140, 160, 175, 183, 187, 193, 200-245, 309-316, 365, 397-398, 402, 403-407, 413-414, 455.

3rd Sess., p. 7, summarizes the facts upon which the legislation rests:

> "Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony at the joint hearings held on H. R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce have been open to goods produced under substandard labor conditions; * * *"

The Senate Committee Report, No. 884, 75th Cong., 1st Sess., pp. 4-5, contains the following statement:

> "This law proposes to accomplish this purpose by closing the channels of interstate commerce to goods produced under conditions which do not meet the rudimentary standards of a civilized democracy. * * * It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce."

The Fair Labor Standards Act itself outlines its objectives as follows:

> "Finding and Declaration of Policy
>
> "Sec. 2 (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) *causes commerce and the channels and instrumentalities of commerce to be*

used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) *constitutes an unfair method of competition in commerce;* (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) *interferes with the orderly and fair marketing of goods in commerce.*

"(b) It is declared to be the policy of this Act through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." (Italics supplied.)

This court has recognized that the intention of Congress was to regulate the production and movement of goods which compete with other goods in a commercial sense. In *United States* v. *Darby*, 312 U. S. 100, the court said (p 122):

"* * * As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; * * * The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as 'unfair', as the Clayton Act has condemned other 'unfair methods of competition' made effective through interstate commerce. * * *"

Turn now to the Arkansas Ordnance Plant where petitioners were working when the claims arose upon which the present suit is founded. This was one of about 100 great plants built by the Government on Government land. The plant was designed and used for a single purpose—to produce munitions for use in the war. In ordinary times

such a plant would be managed by military men. But these were not ordinary times. On the contrary, the ammunition requirements which the Ordnance Department was expected to satisfy obviously demanded more managerial competence than all the resources of the Government could possibly furnish.

The following extracts from the speech of Colonel Gerber referred to in footnote 5 above are pertinent:

"In the 1940 world of uncertainty of daily crises, of mounting fears and terrors, what did we do about ammunition? The immediate problem was clear. The total production in the U. S. of smokeless powder and TNT which are basic in the manufacture of ammunition was about 100,000 pounds per day each, which is roughly the quantity sufficient to maintain an army of only 100,000 troops on the field of active combat for a single day. The existing facilities for the loading of new military ammunition consisted of two Government arsenals, one, Frankford Arsenal, for the manufacture of small arms ammunition, and the other, Picatinny Arsenal, for the loading of ammunition other than small arms. * * *

"The capacity of the Government arsenals was not a capacity intended to meet the needs of war. They had been traditionally laboratories for the technological improvement of ammunition, rather than factories for mass production. We had only one such Arsenal for large ammunition. Further, the production that was needed was inconceivable on any basis other than that of actual newly constructed capacity, for the estimated needs were many, many times any capacity that could be hoped for from arsenals. The program for manufacture of ammunition became primarily a program for construction of ammunition plants because there were no facilities in existence which could give the desired production, and there were none which it was practical to adapt to such production, and there were almost no outside sources from which these quantities of ammunition could be obtained. The program called for the immediate construction of plants which could make military explosives and could load shell, bombs and other items with these explosives.

* * *

"In May of 1940 the Ordnance Department was procuring materials of war at a rate of one million dollars per month. In

The only solution was to enlist the services of those private companies which had demonstrated their possession of industrial "know how" in related fields. If the services of these organizations could be obtained to manage these great arsenals of democracy, the job might be done. In 1940 those services could be obtained in only one way, that is to say, by building new arsenals and by hiring those companies to operate them.

May of 1943, we were procuring materials of war at a rate of one and a half billions per month, or 150,000 per cent more than three years previously. In those three years, Ordnance procurement plans had expanded into a 65 billion dollar program, and the Ordnance Department was procuring materials annually which were equal in value to one-half the total national income in 1932. Ammunition procurement has been a substantial part of the Ordnance program, involving the expenditure of approximately two billion, eight hundred million dollars in 1943.

"Prior to 1940, the Ordnance Department was a relatively small branch of an army still handicapped by many of the restrictions and curtailments of the pacifist philosophy of the 20's and 30's. Neither in numbers nor in the all-around ability required, was the existing personnel of the Ordnance Department, or of any other branch of the Government, capable alone of carrying out the tremendous industrial program which was necessary. If the skill for business administration on this gigantic scale existed anywhere, it was possessed by the leaders of industry who had successfully demonstrated their abilities as peace-time administrators and producers.

"It was to these leaders that the Ordnance Department turned for aid in the crisis that was at hand. In 1940, Major Gen. Levin H. Campbell, Jr., who is now Chief of Ordnance, was made Chief of the Facilities and Plant Administration Section, which had the mission of developing the facilities necessary to meet the ammunition program. General Campbell was, and is, a firm believer in the ability of American industry to meet the tremendous problems connected with preparation for war. He felt that the leaders of industry were the logical men to call upon for the practical development of our ammunition program. Accordingly, procedures for the joint management by industry and the Ordnance Department of the ammunition program were

But the operation of a government installation by a private contractor was such a drastic departure from peacetime practices that Congressional action was clearly necessary. Accordingly, the Secretary of War presented to the appropriate committees of Congress the draft of a bill which, with amendments which will be hereafter noticed, became the law commonly known as the National Defense Act of July 2, 1940. The authority conferred on the Secretary of War by that legislation was sufficiently broad to allow the operation of government installations "through the agency of commercial manufacturers", and contracts such as that with respondent speedily followed.

No sooner had these "procedures for the joint management by industry and the Ordnance Department of the ammunition program" been worked out, than the problem of labor relations in these installations came to the fore. After careful study of this question at top level, the "Statement of Labor Policy Governing Government-

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worked out and cost-plus-a-fixed-fee contracts for the operation of ammunition plants were negotiated with various large corporations.

"The names of these contractors are familiar to all of you — duPont, Hercules, Firestone Rubber, United States Rubber, Atlas Powder, Cities Service, and a host of others. People are often surprised to learn that among them are subsidiaries of the Quaker Oats Company, which has done a very good job in loading bombs, and of the Proctor & Gamble Co., which has received the Army-Navy 'E' for its excellence in the loading of ammunition. In addition to these great manufacturing corporations, several large construction engineering companies also went into the business of operating ammunition plants. Chemical Construction Corp., Silas Mason Co., Day & Zimmerman, Todd & Brown, Fraser-Brace, Sanderson & Porter, and Ford, Bacon & Davis are typical examples. These names alone will indicate clearly to you gentlemen the caliber of the business talent which went into the creation of the ammunition industry * * *"

Owned-Privately-Operated Plants" was issued on July 18, 1942, by Under Secretary of War, Robert P. Patterson, and Assistant Secretary of the Navy, Ralph A. Bard, with the approval of William Green, President of the American Federation of Labor, and Philip Murray, Chairman of the Congress of Industrial Organizations.[1] The first two paragraphs of that statement read as follows:

> "Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.
>
> "All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under 'Management Service' contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by

[1] See footnote 13, supra, p. 19.

wages or other costs, production delays or stoppages. The Government reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. *These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.*" (Italics supplied)

There followed an enumeration of policies to be observed in the operation of establishments such as the Arkansas Ordnance Plant. Discrimination in employment because of race, creed, color or sex was prohibited. The recognition of an exclusive bargaining agent was to be deferred until a majority of the estimated total number of employees at the appropriate bargaining unit had been hired. Provision was made for the establishment of grievance procedures with the approval of the representative of the Army or Navy in charge of operations at the plant. Provision was made for disregarding seniority in layoff or reemployment where the factors of ability and aptitude were not equal. Agreements between management and employees were prohibited which in the opinion of the Secretary of War or the Secretary of the Navy would restrict or hamper output. The War and Navy Departments agreed to establish joint policies to govern the exercise of their contractual responsibility to approve or disapprove proposed wage scales at such establishments. Provision was made for War and Navy Department approval of initial wage scales and of any subsequent adjustments therein. Procedures were established for the discharge, at the direc-

tion of the War or Navy Department of persons suspected of subversive activities.

The policies established by this statement were not mere pronouncements. As the findings of fact of the trial court clearly show, those policies were effectively implemented. The control exercised by the War Department over its "Government-owned-privately operated" plants was comprehensive. Indeed, the term "privately-operated" can only be regarded as somewhat Pickwickian. True, the contractor was to recruit the labor force and to supply the staff to supervise it as well as to purchase (with the prior approval of a government representative) a small part of the machinery, equipment, materials and supplies needed to operate the plant. But here the resemblance to ordinary private operation ended.

The contract permitted the War Department to tell the contractor what to produce, in what quantities to produce it, when to produce it, and how to produce it. All of this the War Department did. Moreover, the contract permitted the War Department to tell the contractor where to look for its labor, whom to employ, how much to pay those whom it did employ, what bargaining agents to recognize, and what agreements to make with them. Again the War Department did all this. The War Department paid all the bills and advanced money to the contractor so that it would not be required to use any of its own funds. For its services the contractor received a monthly fee, which bore no relation to the amount of ammunition produced. Small wonder that Judge JOHNSEN in the court below described this as "a novel and revolutionary setup in the field of American industrial life".

See Appendix B, infra, pp. 109-113.

Throughout the period of their operation by private contractors, the peculiar nature of these establishments was recognized.[3] Thus by General Order No. 14, adopted November 24, 1942, as amended August 17, 1943 (8 F. R. 11651), the National War Labor Board delegated to the Secretary of War the power conferred on the Board by Executive Order 9381 (8 F. R. 13083) to carry out the wage policies stated in the order and the directives issued by the Economic Stabilization Director under the order, including especially the authority to pass on wage and salary adjustments of employees whose salaries were not fixed by statute and the power to rule upon all applications for wage and salary adjustments covering civilian employees employed by the War Department, the Army Exchange Service and "Government-owned, privately operated facilities of the War Department". By letter dated December 24, 1942, the Commissioner of Internal Revenue delegated similar authority to the Secretary of War.[4]

Return now to the Fair Labor Standards Act. Would it not truly be a perversion of the process of interpretation to apply the language of that act to the Arkansas Ordnance Plant? The sanctions of that act were designed to give teeth to the Congressional purpose to prevent goods produced under substandard conditions from using the channels of commerce to compete with other goods. Surely, it would be unnecessary to apply such sanctions in a situation where the Government determined the wages to be paid. In *United States v. Wittek*, 337 U. S. 346 (decided June 13,

[3] See opinion of the Comptroller General of the United States in *Todd Shipyards Corporation*, B-85234, June 24, 1949, holding the operator of a navy yard subject to a statute limiting expenditures by the Navy Department.

[4] For the text of this letter, see War Department Procurement Regulations §800.903-3, 10 F. R. 1887 (1945).

1949), this court held that the District of Columbia Emergency Rent Act of December 2, 1941, had no application to houses constructed by the Navy Department under the authority of Section 201 of the Second Supplemental National Defense Appropriation Act of 1941. These houses were being operated and managed by the National Capital Housing Authority, a governmental agency originally created under another name by Executive Order No. 6868. The Court of Appeals for the District of Columbia Circuit had held that this agency was a "landlord" as that term was defined in the Emergency Rent Act. This court, speaking through Mr. Justice BURTON, said 337 U. S., at p. 355:

> "The issue before us does not turn upon what particular agency is operating the Bellevue Houses or the other Government-owned housing of the United States. The issue is whether the United States, *through whatever agency it operates*, is to be controlled in its rental policies by the District Administrator of Rent Control." (Italics supplied).

After pointing out that the defense housing involved in that case could hardly be distinguished from certain government-owned low-rent housing projects also operated by the National Capital Housing Authority, Mr. Justice BURTON said, 337 U. S., at p. 360:

> "We find no evidence that Congress believed that the managers of any of its housing projects in the District would be 'tempted * * * to demand exorbitant rentals' or engage in the rent-gouging practices * * * against which the new Act was directed. It seems obvious that the need for District rent control was not in the operation of Government-owned housing, where the Federal Government already had complete control over the rentals, but was in the operation of privately owned housing, where neither the Federal nor District Governments had any control."

The parallel to the present case seems evident. True, in the *Wittek* case the operating agency was itself a governmental body, while in the present case the respondent is a private corporation, but, as in that case, so here, "the issue does not turn upon what particular agency is operating." As in that case, so here, the need of regulation of wage rates was not in the operation of government-owned munition plants where the Federal Government already had complete control over the wages but was in the operation of privately-owned industries whence substandard conditions spread through the operation of competitive forces.

We submit that the words of the Fair Labor Standards Act were chosen because of their application to the conditions which Congress was seeking to regulate. Just as the framers of the Georgia statute exempting the Atlantic Coast Line "from taxation" were not thinking of income taxes to be imposed a century later (*Atlantic Coast Line v. Phillips*, 332 U. S. 168 (1947)) so the framers of the Fair Labor Standards Act, in choosing the words which determined the ambit of that act, never contemplated the "new and unique tripartite relationship among government, labor and management" which first came into being under the National Defense Act of July 2, 1940. The conclusion, we submit, must be that the Arkansas Ordnance Plant and other government-owned privately-operated installations like it are completely outside the scope of the Fair Labor Standards Act.

This conclusion is strengthened by a study of the sanctions which Congress provided for the enforcement of the Act. The incongruities involved in applying those sanctions to the Arkansas Ordnance Plant are obvious. Suppose, for example, that the petitioners are upheld in their contention that they have done overtime work for which

they have not been paid as the act requires. Did Congress really intend that the transportation officer at the Arkansas Ordnance Plant who shipped detonators to the Hampton Roads port of embarkation should be subject to fine and imprisonment? Yet Section 15 of the Act makes it unlawful for "any person" to ship any goods in the production of which any employee was employed in violation of Section 7 of the act, and Section 16 subjects any person who wilfully violates any of the provisions of Section 15 to fine or imprisonment or both. Suppose again that petitioners are correct in their contention that they were not paid as the act required. Was the District Court of the United States for the Eastern District of Arkansas authorized to enjoin the commanding officer at the Arkansas Ordnance Plant from shipping munitions to other military installations? Yet does not Section 17 of the Act confer jurisdiction upon that court to restrain violations of Section 15? Moreover, as Judge JOHNSEN said below (App. R. p. 32):

> "if Congress had intended the employees of the approximately 100 government-owned munitions plants, that were established, to have rights beyond those granted by the National Defense Acts or the Walsh-Healey Act, and to be able generally to recover double damages and attorneys' fees, it hardly seems reasonable to suppose that it would have left the situation so that those working in some plant, which might by chance be making guns, ammunition, or other supplies entirely for use at some training camp or on some rifle or artillery range, existing within the same state where the plant was located, would be precluded from such benefits on the basis of a commerce test, when it had the power, and there would seem to be no reason not to have treated them equally with the employees of other such munitions plants."

Petitioners point to the fact that Section 3(b) of the Act defines "commerce" in broad terms. They say that the

word, as used in the Constitution, has been held to include the movement of goods or persons across state lines even though no commercial transaction or purpose is involved. But this, it is submitted, is just the kind of mechanical application of definitions to unintended contexts which Chief Justice VINSON had in mind in the remarks previously quoted from his opinion in *Farmers Irrigation Co. v. McComb*, 337 U. S. 755 (1949). It assumes that the word "commerce", as used in this act, must have the same meaning as the same word when used in the Constitution of the United States. It overlooks the fact that "In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority".[25]

Petitioners then seek to rest upon what they claim to have been the administrative construction of the Fair Labor Standards Act. In this connection, they refer to certain correspondence passing between the War Department and other branches of the government, subsequent to the passage of the National Defense Act of July 2, 1940. But it is submitted that this correspondence, when properly understood, does not establish an administrative construction sufficiently definite to carry much weight. Of course, all employees of government-owned contractor-operated plants were paid overtime during the war unless they were in the salaried class, in which case their compensation took account of overtime work. The labor market was such as to to require such payments, quite apart from any statutory provisions. This is made clear by respondent's answer to one of petitioners' requests for admission of fact where it is said:

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[25] Mr. Justice REED in *McLeod v. Threlkeld*, 319 U. S. 491 (1943), at p. 493.

"As a practical matter, the Ordnance Department instructed and approved the payment of all hourly-paid employees at one and one-half or two times their regular hourly rate for all hours in excess of forty worked during any one workweek, thereby eliminating as to them any question of coverage under the Act."

Some contractors, however, became fearful lest the General Accounting Office might seek to disallow vouchers for overtime where no statute required their payment, and to quiet their fears, the Secretary of War sought a ruling of the Comptroller General. The purpose of the letter to the Comptroller General was to obtain a ruling that overtime payments made by contractors to certain classes of employees not covered by the Walsh-Healey Act should not be disallowed by the General Accounting Office. Not unnaturally, the Secretary of War stressed the arguments in favor of the application of the Fair Labor Standards Act. Nevertheless, a reading of the entire letter makes it clear that the Secretary was careful not to commit the War Department to any final view on this question (see Decision B-2864, Sept. 28, 1942, 22 Dec. Comp. Gen. 227). The ruling of the Comptroller General was similarly guarded and went no further than to say that "if it be administratively determined that the interests of the Government will be best served by conceding that the guards here involved are entitled to overtime pay under the Fair Labor Standards Act, this office will not be required to take issue with that view". This was sufficient to satisfy the contractors, and the problem was laid at rest for the time being.

When at a later date claims for overtime were advanced (on theories then novel) by employees at government-owned-contractor-operated establishments, the War De-

(S. R. 128). Compare in this connection the provision of War Department Procurement Regulations, §800.977, 10 F. R. 1883 (1945).

partment, with full concurrence of the Navy Department, at first urged that these claims be resisted. However, because of the desire not to raise collateral issues which might at that time have proved embarrassing, the armed services acquiesced in the decision of the Department of Justice not to permit any defense to these claims to be rested on the ground that they were not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. The correspondence between the War Department and the Attorney General makes it entirely clear that there was no concession on the part of the War Department that the Wage and Hour Administrator was correct in his view that the statute did apply to such installations as the Arkansas Ordnance Plant.[27]

Finally, petitioners point to certain recitals in the Portal-to-Portal Act of 1947 and assert that these show that Congress recognized the applicability of the Fair Labor Standards Act to cost-plus-a-fixed-fee-contracts with the government for production of munitions. In the same connection they refer to the reports of legislative committees explaining the provisions of the Portal-to-Portal Act. The answer to these contentions is clear. The debates on the Portal-to-Portal Act demonstrate that Congress was fully aware of the fact that the application of the Fair Labor Standards Act to government-owned-privately-operated facilities was doubtful.[28] Furthermore, the question in

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[27] See Appendix C, infra, pp. 114-123.

[28] During the course of the debates on H. R. 2157, which became the Portal-to-Portal Act, Senator Donnell, one of the authors of the Act, made the following statement on the floor of the Senate (Vol. 93, Cong. Rec. 80th Cong., 1st Sess., p. 2364.

"Mr. President, those two acts should be included. In the first place, it is true, of course, that few suits, if any, have been filed hitherto under the Bacon-Davis Act or the Walsh-Healey Act

this case is not as to the application of the Fair Labor Standards Act to cost-plus-a-fixed-fee-contracts as such. The question is as to its application to government-owned-privately-operated establishments such as the Arkansas Ordnance Works, and the fact that the contractor in such cases was operating under a cost-plus-a-fixed-fee-contract is only one of many factors which must be considered.

By the same token, it serves little purpose to refer, as do petitioners, to abortive legislation, the effect of which would have been to suspend generally all wage and hour legislation in its application to war production. Nor can important significance be attached to the testimony given by officials of the War, Navy and Labor Departments and of the War Production Board in opposition to such legislation. Obviously, there were many war production con-

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The reason is clear. It is that under those acts all a man can recover is the amount of wages to which he is entitled. Under those acts no one is entitled to recover liquidated damages equal to the amount of wages to which he was entitled. However, Mr. President, two facts should be noted. In the first place, great difficulties may develop for employers in the future, under the Fair Labor Standards Act, because in the case of war contracts, there is great doubt whether suits, even though nominal, against employers are in fact against the Government, and obviously under the Fair Labor Standards Act a suit cannot, by the express provisions of that act, be maintained against the Government.

"Furthermore, it may well be held that suits may not be filed and successfully maintained by employees who were working on war contracts, because interstate commerce might not be involved in such suits. There is now in existence a subcommittee of this body which has been looking into the fact that at one time the Attorney General directed that these two defenses—namely, the absence of the interstate commerce element and the fact that the Government is the real party in interest—not be made."

See also in this connection the text of Senate Resolution No. 73, introduced on July 27, 1947, and referred to the Judiciary Committee.

tracts to which the Government was not a party, and blanket legislation such as was proposed in the bills in question might have had a disrupting effect on war production in situations where the Government was not in a position to control the wages paid.

III.

The Walsh-Healey Act Applied to Employees of the Arkansas Ordnance Plant to the Exclusion of the Fair Labor Standards Act

(a) The Fair Labor Standards Act Was Never Intended to Cover Employees Working Under Government Contracts

All seven judges of the Court of Appeals concurred in the conclusion that the Walsh-Healey Act alone applied to the employees of the Arkansas Ordnance Plant. Six judges concurred in an opinion delivered by Judge Collet, who, after referring generally to the provisions of the Fair Labor Standards Act and the Walsh-Healey Act, stated the question to be decided in the following terms:

> "Which of these two Acts did Congress intend should apply to a cost-plus-a-fixed-fee contractor manufacturing munitions of war exclusively for the United States under contract with the United States?" (App. R. 19).

After analysis of the provisions of both acts, Judge Collet stated that the Court was of the opinion "that the two Acts are sufficiently divergent that both may not apply at one and the same time, that the Walsh-Healey Act was intended by Congress to apply to the employees of manufacturers engaged in producing munitions of war for the United States, and that under the Walsh-Healey Act liquidated damages and attorney fees may not be recovered by the employee" (App. R. 22).

Judge JOHNSEN filed a separate concurring opinion in which he was joined by three of his brethren. He stated that the National Defense Act of July 2, 1940, might well be construed to confer on the Secretary of War plenary powers to fix wage scales and overtime rates and rights for those employed in the "hybrid relationship" involved in the munition plants constructed and operated under the emergency authority of that act, without regard to the provisions of either the Fair Labor Standards Act or the Walsh-Healey Act. However, he found it unnecessary to decide this question because the War Department, in its contract with the operators of the plant, had, as it was clearly authorized to do, specifically made the provisions of the Walsh-Healey Act applicable to the wages and overtime rights of those employed at the plant. After analyzing the provisions of the Walsh-Healey Act, he reached the conclusion that they were essentially incongruous with the provisions of the Fair Labor Standards Act (App. R 24-32).

To repeat here the arguments which are made in those opinions would be a work of supererogation. They seem to us to demonstrate the complete incompatibility of the two statutes. This is particularly true of Judge JOHNSEN's concurring opinion which develops in a striking way the contradictory provisions of the two Acts in so far as they relate to overtime work. An additional point in support of Judge JOHNSEN's argument might have been developed from conflicting provisions of the two Acts with respect to enforcement. Under the Walsh-Healey Act, the Labor Department, in appropriate cases to adjust the differences between contractors and their employees, arrives at mutually agreeable settlements involving no payment of liquidated damages. However, under the provisions of the Fair Labor Standards Act, prior to the passage of the Portal-to-Portal Act, any such procedure was futile. *Brooklyn Sav-*

ings Bank v. O'Neill, 324 U. S. 697 (1945); *Schulte, Inc. v. Gangi*, 328 U. S. 108 (1946). Moreover, even where no compromise is involved, the Walsh-Healey Act imposes on the Labor Department the duty of withholding amounts due under minimum wage determinations, but no power is given to withhold liquidated damages. Consideration might also be given here to the absurdity of applying the fine and imprisonment and injunctive relief provisions of the Fair Labor Standards Act heretofore mentioned, (supra, pp. 38-39).

The fundamental problem is to determine the *intent* of of Congress in enacting the Fair Labor Standards Act. In that connection a brief comparison of the two acts and an analysis of the findings and declaration of policy contained in the Fair Labor Standards Act may be helpful. We have already referred to the general background of the legislation which was enacted following the depression of the early 1930's (supra, pp. 26-29). The Walsh-Healey Act was the first of these statutes. It applies to contracts with the Government for the manufacturing or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, and requires all of such contracts to contain certain stipulations. Among these stipulations is the requirement that all persons employed by the contractor in the manufacture of the goods used in the performance of the contract must be paid the minimum wages as determined by the Secretary of Labor to be those prevailing locally for persons in the particular industry, and that no persons may be employed by the contractor in the performance of the contract in excess of eight hours in any one day or in excess of forty hours in any one week, unless all hours worked in excess of eight per day or forty per week are compensated at time and one-half the basic rate, except those employed under annual collective bargaining

contracts. The Walsh-Healey Act does not give an employee as liquidated damages an amount of unearned overtime equal to the amount of earned overtime withheld, but any unpaid overtime could be collected at Government expense and without cost to the employee.

Thus prior to the passage of the Fair Labor Standards Act there was in full force and effect a law giving to employees of Government contractors not only all of the benefits which the petitioners now claim under the Fair Labor Standards Act, except the right to receive in addition to the alleged unpaid overtime compensation an equal amount as liquidated damages, but certain additional benefits.

With the passage of the Walsh-Healey Act, following as it did the Davis-Bacon Act,[46] the "Kickback" or Copeland Act,[47] the Eight-Hour Law,[48] and the Heard or Miller Act,[49] Congress had established a definite pattern of laws governing wages and hours and related matters, in the field of Government contracts. These laws evidence the Congressional policy that employees in that field should receive overtime at the rate of time and one-half after forty hours, but without any provision for liquidated damages for nonpayment. Coverage of employees under these laws was not limited to employees engaged in commerce or in the production of goods for commerce, since none of these laws was enacted pursuant to the power granted by the Commerce Clause of the Constitution.

Thereafter, as we have seen (supra, p. 27), the Administration proposed the legislation which ultimately be-

[46] 46 Stat. 1494, 49 Stat. 1011, 40 U. S. C. 276a-276a-7.
[47] 48 Stat. 948, 54 Stat. 1236, 40 U. S. C. §276c.
[48] 37 Stat. 137, 40 U. S. C. 324, 325.
[49] 49 Stat. 793, 40 U. S. C. 270a-270d.

came the Fair Labor Standards Act of 1938. The testimony in the extensive Congressional hearings on that legislation makes it clear that the heart of the problem, so far as the national economy was concerned, was that goods produced under substandard conditions moved in interstate commerce in competition with other goods, and in this manner the substandard conditions tended to spread throughout the country.[33] This thought was carried forward into the text of the Fair Labor Standards Act itself, which contains a specific finding and declaration of policy not only identifying the evil sought to be cured and specifying the proposed remedy, but also indicating the belief of Congress as to the source of the evil and the source of the constitutional authority for the particular remedy to be used.

It will be noted that Congress in Section 2(a) of the Act found the existence of certain evils which it sought to correct, i.e., labor conditions deemed detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. These conditions were not found or required to exist in connection with the performance by the Government of its administrative function or in the field of Government contracts generally, but only "in industries engaged in commerce, or in the production of goods for commerce". The definition of the term "industry" in Section 3(h) of the Act does not include the United States in the performance of its administrative functions, or in the exercise of its war powers, but limits the term to "trade, business, industry, or branch thereof, or group of industries". The findings of Congress as to the existence in certain industries of detrimental labor conditions which burden commerce, constitute an unfair method of competition in commerce and in-

[33] See footnote 20, supra, p. 27.

terfere with the orderly and fair marketing of goods in commerce, are manifestly not directed at nor were they applicable to the transportation by the Government of Government-owned munitions for the use of the Government's armed forces in time of war.

It is obvious that the considerations for the enactment of the Fair Labor Standards Act do not apply to the Government either as an employer or as the owner of a munitions plant operated for the Government under a cost-plus-a-fixed-fee contract such as the one pursuant to which the Arkansas Ordnance Plant was operated, and this cannot be ignored.

Finally, Congress, in Section 2(b), specifically stated that the Act was being enacted "through the exercise by Congress of its power to regulate commerce among the several States."—the exact language of the Commerce Clause, Article 1 of Section 8 of the Constitution. Thus Congress declared that it sought to accomplish the purposes of the Act by the exercise of a specific power delegated to Congress by the Constitution.

The commerce which Congress has the power to delegate is commerce "among the several states". It has been repeatedly defined by the Supreme Court as activities carried on by and among the citizens of the several states, not those of the Government itself. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885); *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 241 (1899); *Carter v. Carter Coal Co.*, 298 U. S. 238, 298 (1936). The activities of the Government itself, as distinguished from the activities of the citizens, both natural and corporate, of the several States, are not commerce in the constitutional sense, subject to regulation under the Commerce Clause. When Congress based the Fair Labor Standards Act upon

the power delegated to it to regulate commerce, it defined and limited the intent, purpose and scope of the Act as being applicable to those activities which come within such delegated powers, i.e., to commerce conducted by the people of the several states and not to the administrative or war time activities of the Government itself.

Having in mind the background and history of the Fair Labor Standards Act, the findings and declaration of policy expressed in the Act, and the fact that there was then in full force and effect, as a part of the system of Government Contracts Laws protecting employees of Government contractors, the Walsh-Healey Act, which gave to employees of Government contractors all of the benefits which the petitioners now claim under the Fair Labor Standards Act, except the right to receive in addition to the alleged unpaid overtime compensation "an equal amount as liquidated damages," can it be truly said that the failure to provide for such additional "windfall" was one of the evils which Congress sought to cure by the enactment of the Fair Labor Standards Act? Is it reasonable to assume that Congress intended by the Fair Labor Standards Act to provide that employees on Government contracts should receive, at Government expense, not merely time and one-half overtime, but an additional equal amount "as liquidated damages", when, as in the present case, the Government had, in the first instance, approved the wage scales and payment of wages made to these petitioners? It would appear that since Congress had, by the Walsh-Healey Act, already made provision for workmen employed by contractors dealing with the Government, it was the purpose of Congress in enacting the Fair Labor Standards Act to extend the benefits already enjoyed by workers on Government contracts over the larger field of workers in private industry whose employers were not engaged as Govern-

ment contractors. This Congress expressly sought to do pursuant to the power delegated to it under the Commerce Clause of the Constitution, and inserted the double damage provision as an aid to enforcement and as a species of compulsion against private industry. Surely Congress did not need to provide further penalties against the Government over and beyond those contained in the Walsh-Healey Act. While Congress may have had, in the field of private industry, unregulated by the provision of the Walsh-Healey Act, a reason for providing for liquidated damages without reference in any respect to actual damages, as a means of compulsion to secure observance of the law, there was and is no need of any such liquidated damages in the field of Government contracts, particularly cost-plus contracts for the operation of Government-owned plants, where every action of the contractor is controlled by the Government, checked and supervised by Government auditors and inspectors, and where the Government pays the bill.

We submit then that the Fair Labor Standards Act must be read in the light of (a) Congress's finding as to the evil which it sought to remedy, (b) the policy which it sought to enforce, (c) the power which it sought to exercise, (d) the means of accomplishment of the desired end, and (e) the existence on the statute book of the Walsh-Healey Act, already covering with respect to employees on Government contracts the same field covered by the Fair Labor Standards Act. So read, it will appear that Congress did not intend to have any general language used in the Act applied against the Government itself, and in this connection it is, of course, the well established rule of law that general legislation does not include the Government unless the legislation shows that it expressly or by necessary implications was intended

that the Government be included. *United States v. United Mines Workers of America*, 330 U. S. 258, 272-275 (1948).

As throwing further light upon the intent of Congress in enacting the Fair Labor Standards Act, we direct the court's attention to the provisions of the First War Powers Act wherein Congress empowered the President to authorize any department or agency of the Government to enter into contracts and into amendments or modifications of contracts "without regard to the provisions of law relating to the * * *" performance, amendment, or modification of contracts whenever he deemed such action would facilitate the prosecution of the war. By this Act Congress specifically authorized the President to suspend the provisions of all laws relating to the performance of contracts with the Government, with the single exception of the laws relating to the limitation of profits.[*]

Pursuant to the authority of the First War Powers Act, the President promugated on December 27, 1941, Executive Order No. 9001, (3 C. F. R. Cum. Supp. p. 1054) in which he authorized the War Department "to enter into contracts and into amendments or modifications of contracts * * * without regard to the provisions of law relating to the * * * performance * * * of contracts", but added an express limitation containing, in effect, the Walsh-Healey Act, the Davis-Bacon Act, the Copeland Act, and the Eight Hour Law, i.e., all other Acts touching on the subject of Government contracts. But the Fair Labor Standards Act was not mentioned. It seems clear that the reason for its omission was because that Act was not deemed to apply to contracts of the nature authorized by

[*] Act of December 18, 1941, c. 593, 55 Stat. 838, 50 App. U. S. C. 601-622.

the First War Powers Act or Executive Order 9001. And the specific definition of contracts set forth in Executive Order 9001 includes contracts of the kind pursuant to which the Arkansas Ordnance Plant was operated.

In an effort to overcome the force of the arguments advanced by the Court of Appeals, petitioners and the Government resort to arguments which, upon analysis, appear to be woefully thin. Thus they contend that Section 18 of the Fair Labor Standards Act gives "affirmative and conclusive evidence" that employees subject to the Walsh-Healey Act are not excluded from the Fair Labor Standards Act because that section provides that nothing in the Fair Labor Standards Act shall be held to excuse non-compliance with any other Federal or State statute. The failacy of this contention becomes transparent when it is considered that the mandate of Section 18 can be completely obeyed by holding that the Walsh-Healey Act excludes the operation of the Fair Labor Standards Act.

The decision in *Walling v. Patton-Tully Transp. Co.*, 134 F. (2d) 945, 948 (6 Cir. 1943) is then invoked. The court in that case announced that it saw no incompatibility between the Eight Hour Law and the Fair Labor Standards Act. The correctness of that decision may be conceded without in any way weakening the force of the argument made by the Court of Appeals in the present case, for the provisions which make the Walsh-Healey Act incongruous with the Fair Labor Standards Act are plainly absent from the Eight Hour Law.

Petitioners and the Government then resort to the fact that Congress has voted appropriations for the enforcement activities of the Administrator with knowledge of the fact that in his annual reports and in testimony given before Congressional Committees he stated that he was

administering the two acts as if they were overlapping. The startling assertion is made that this constitutes "confirmation and ratification" by Congress of the Administrator's interpretation. Without stopping to analyze the decisions of this court, which are cited in support of this remarkable contention, it is sufficient to say that none of them goes to any such length. It would certainly be strange if, in addition to its manifold other responsibilities, Congress were required to take affirmative action to correct every erroneous assumption which may be found in the countless administrative reports and the vast outpouring of testimony of administrative officials which come to the attention of its various committees. Moreover, the judicial function of interpreting legislation has hardly been degraded to the level where courts must follow the opinions of administrators no matter how erroneous unless Congress acts affirmatively to correct them. Even if the doctrine invoked by petitioners and the Government could be supported in some cases, it would be particularly unrealistic to apply it in a case such as the present where, at the time when the Administrator made his reports and gave his testimony, the opinions which he expressed on this particular subject appeared to be entirely academic.

Finally, petitioners point to the amendment to the Walsh-Healey Act which was adopted in 1942. (Act of May 13, 1942, c. 306, 56 Stat. 277, amending 41 U. S. C. 35.) That amendment provided that the provisions of the Walsh-Healey Act should have no application to those employers who had entered into agreements "pursuant to the provisions of paragraph 1 or 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938'". This, it is argued, proves that the two acts overlap. But it is submitted that it proves nothing of the sort. Obviously, Congress adopted a shorthand method

of describing those employers who had made a certain type of agreement with their employees. Such agreements might well have been made by employers having both governmental and non-governmental work in their plants. Undoubtedly, both Acts would apply to that employer in such a case, unless express provision to the contrary was made.

It may be conceded that the decision of the Court of Appeals rests on a novel ground. It must also be admitted that Government officials generally have always proceeded on the assumption that the two acts overlap, nor has any contractor previously found it worthwhile to raise the issue. But we respectfully submit that a more persuasive refutation than the mere fact of novelty is necessary to meet an argument as powerful as that made in the opinions below.

(b) The Act of July 2, 1940, Excluded the Operation of the Fair Labor Standards Act

Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F. (2d) 416 (1945), at p. 429, pointed out that "in *United States v. Hutcheson*, 312 U. S. 219 * * * a later statute in pari materia was considered to throw a cross-light upon the Anti-trust Acts, illuminating enough even to override an earlier ruling of the court". Bearing in mind its legislative history, the light which the National Defense Act of July 2, 1940, casts upon the Fair Labor Standards Act of 1938 is considerably more direct than that which the Norris-LaGuardia Act threw upon the Anti-trust Acts; for it appears that in considering the National Defense Act of July 2, 1940, Congress gave careful thought to the regulations which should govern labor conditions in establishments such as the Arkansas Ordnance plant

The Act as it passed the House lacked any provision with regard to labor standards.[35] A companion bill, also passed by the House at the instance of the Navy Department, contained a provision relating to overtime payments which was intended to exclude all work done by contractors with the Navy Department from the operation of the Walsh-Healey Act. Strong protest against this provision was made by representatives of labor organizations and by the Labor Department. Some of the protestants took the view that the application of the Fair Labor Standards Act was also involved.[36]

During the course of the hearings it developed that a serious doubt existed whether the Walsh-Healey Act would, by its terms, have any application to negotiated contracts. As the principal purpose of the bill was to authorize the Secretary of the Navy to negotiate contracts instead of following the customary course of advertisement for bids, the Labor Department and the Navy Department together worked out a proposed amendment which they jointly recommended to the committee.[37] This amendment was adopted, together with a further amendment limiting the overtime provisions of the House Bill to government personnel. In explaining these amendments, the report of the Senate Committee said:

> "In view of the volume and money value of the contracts that may be entered into under the authority to negotiate, the committee considered it desirable to make the provisions of the Walsh-Healey Act applicable to such contracts."[38]

[35] See House of Representatives Report 2261, 76th Cong., 3rd Sess.

[36] See Senate hearing on H. R. 9822, 76th Cong., 3rd Sess., pp. 95, 149, 150.

[37] See hearings cited in preceding footnote, pp. 36-37.

[38] Senate Report 1803, 76th Cong., 3rd Sess. (Committee on Naval Affairs, June 20, 1940) re H. R. 9822, p. 7.

The bill as thus amended was enacted into law and is sometimes known as the National Defense Act of June 28, 1940.[39]

In the meantime, the bill sponsored by the War Department, which, as we have seen, had passed the House with no provision whatsoever relating to overtime payments, came up for consideration on the floor of the Senate. This bill, like the Navy bill, contained broad authority to the Secretary of War to enter into contracts by negotiation rather than by advertisement for bids. Thus it raised the same doubts as to the applicability of the Walsh-Healey Act which had been considered in connection with the Act of June 28, 1940. When the bill came up on the floor, Senator Wagner offered an amendment to deal with this question, in explaining which he said:

> "Unless this amendment is adopted, we would have this anomalous situation: Under a contract entered into with the Government as the result of public bidding, one set of minimum wages, that is, the prevailing wages, would be applied, whereas under another contract entered into as a result of negotiations, a much lower minimum wage would be paid, that is, the flat minimum under the Wage and Hour Act. This situation would present an opportunity for exploitation, since a contractor under a negotiated contract might be paying wages in some instances 25% to 75% below those required under the Walsh-Healey Act. I am sure we would not want to invite any such exploitation. * * * The amendment simply makes it very clear that the minimum wage and other standards under the Walsh-Healey Act shall apply to both types of contracts, because, as I say, there is no difference between them at all except in the matter of advertising."[40]

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[39] C. 440, 54 Stat. 676, 50 (App.) U. S. C. 1151.

[40] Cong. Rec. Vol. 86, Part 7, p. 7924.

On the same day Senator LaFollette offered an amendment from the floor providing for minimum working hours of employees of the War Department, making the statement, inter alia:[11]

> "In the pending bill as it now stands there is no provision covering overtime pay. I have conferred with the chairman of the committee, and he informs me that he is willing to accept the amendment in order that the subject matter may be in conference, and when the final policy is worked out upon the Naval bill it will give the conferees on the Army bill an opportunity to bring the two measures into uniformity so far as the pay of employees who are required to work overtime is concerned."

Conferences between committees of the two Houses of Congress were then held, and conference reports submitted. The only references in the Conference Committee Report to the hours and wage provisions of the bill were as follows:[12]

> "* * * The conference agreement also provides that instead of all contracts under the section being subject to the provisions of the Walsh-Healey Act, no such contract which would otherwise be subject to such act should be exempt from its provisions solely because it was entered into without advertising. * * *"
>
> "Section 4 (b) of the Senate amendment provided that the regular working hours of employees of the War Department and field service should be 8 hours a day and 40 hours per week during the period of any national emergency declared by the President and made provision for overtime payment in excess of 40 hours in any administrative work-week at a rate not less than one and one-half times the regular rate. There was no corresponding provision in the House bill. The conference agreement retains the Senate

[11] Cong. Rec., Vol. 86, Part 7, p. 7925.
[12] Cong. Rec., Vol. 86, Part 8, p. 8901.

provision but modifies it so that it is applicable only to laborers and mechanics employed by the War Department who are engaged in the manufacture or production of military equipment, munitions, or supplies * * *"

After submission of the conference report the following discussion took place in the House:[43]

"Mr. Vinson: Would the gentleman state to the House what disposition was made with reference to time and a half for overtime?

"Mr. May: Yes; I will be glad to do that. Under the Senate Bill the provision required that all employees in the War Department, without regard to civil service or without regard to classification, should be paid for 8 hours' work, and for any overtime they were to be paid time and a half for such overtime. The conference report, as agreed to by the conferees, now provides that that shall apply only to those employees, including mechanics and experts, actually engaged in the production of war materials and supplies in the plants, and it would not apply to thousands of civilian employees who work for the War Department that would be claiming overtime, on a fixed per annum basis or what is known as a fixed salary basis.

"Mr. Vinson: I just want to understand that it does not apply to stenographers and clerks in the War Department either here or out in the field?

"Mr. May: That is right. It is intended to allow wage earners and not salaried persons the benefit of overtime allowances.

"Mr. Vinson: But only to the people who do actual labor?

"Mr. May: Only to the people who do actual labor. It does not apply to the civilian employees of the Corps of Engineers * * *."

[43] Cong. Rec., Vol. 86, Part 8, p. 8902

Thus we see (a) that Congress in enacting the Act of July 2, 1940, specifically understood and intended that contracts entered into pursuant to that act should be subject to the provisions of the Walsh-Healey Act, but made no provision for the application of the Fair Labor Standards Act, and (b) that Congress in fixing overtime policy with respect to government employees was careful to limit it to those classes of employees who, if employed by private contractors, would have come within the scope of the Walsh-Healey Act and to exclude those additional categories which are covered by the Fair Labor Standards Act where that act applies. "That Congress could have extended the coverage of these provisions to these contracts is unquestioned; the fact that it did not do so cannot be disregarded by this Court."[11] The conclusion seems inescapable that Congress intended by the National Defense Act of July 2 1940, to prescribe a complete system of labor relations in Government-owned-privately-operated plants, which system precluded the operation of the Fair Labor Standards Act.

Petitioners and the government argue that the remarks of Senator Wagner quoted above indicate a belief on his part that the Fair Labor Standards Act was applicable to all contracts entered into under the authority of the Act of July 2, 1940. But this, it is submitted, is to place too broad a construction upon his words. Obviously, there are a large number of negotiated contracts to which the Fair Labor Standards Act would ordinarily apply. If it be assumed that the Walsh-Healey Act would have no application, fixed price contracts entered into with private contractors for production of munitions at privately-owned plants where the goods were delivered to the government

[11] Mr. Justice REED in *Muschany v. United States*, 324 U. S. 49 (1945), at p. 58.

after shipment across state lines by the contractor would certainly seem to fall in this category. Senator Wagner's remarks were not directed to the distinction between contracts of that character and management service contracts for the operation of government installations. They were directed toward the distinction between contracts entered into by negotiation and those entered into by award after advertisement.

It will be noticed that Senator Wagner made reference to the incongruity between the standards applicable under the Walsh-Healey Act and those applicable under the Fair Labor Standards Act. As we have seen (supra, pp. 44-46), those incongruities led all seven judges of the Eighth Circuit unanimously to the conclusion that the provisions of the Walsh-Healey Act and the provisions of the Fair Labor Standards Act could not simultaneously apply to the work done by petitioners in the Arkansas Ordnance Plant and similar installations. Certainly, the legislative history of the National Defense Act of July 2, 1940 fully supports the contention that the Walsh-Healey Act was intended by Congress to have exclusive application to the production of munitions of war under contracts negotiated pursuant to the authority of that act. In any event, we are satisfied that the Fair Labor Standards Act is inapplicable to operations such as that in which this respondent was engaged at the Arkansas Ordnance Plant for reasons now to be stated.

IV.

The Petitioners Were Not Engaged in the Production of Goods for Commerce

What has been said in the preceding pages seems to us to demonstrate that petitioners were not engaged in the production of goods for commerce as those words are used in the Fair Labor Standards Act. The trial court so found

for reasons which were stated at length in its opinion (R. 64-79). The conclusion of the trial court that petitioners were not engaged in the production of goods for commerce finds wide support in the decisions of other courts. A reading of the opinions filed in those cases shows that the courts have generally reached the result on one of two principal grounds.

(a) The Shipment by the Government Across State Lines of Government-Owned Munitions of War, Manufactured and Shipped Solely for War Purposes, is not "Commerce" Within the Meaning of the Fair Labor Standards Act

In the brief of the Government, an attempt is made to indicate that the Fifth Circuit stands alone in holding that the shipment by the Government across state lines of Government-owned munitions of war, manufactured and shipped solely for war purposes is not "commerce" within the meaning of the Fair Labor Standards Act (see p. 117 of the Government's Brief). On the contrary, as we shall see, the Court of Appeals of the Second Circuit has stated and applied this principle in a series of cases. The Court of Appeals of the Sixth Circuit has also applied it in a carefully considered opinion. The Court of Appeals of the Eighth Circuit in its opinion below in the *Powell* case has at least by implication indicated its acquiescence in that view.[1] The Court of Appeals of the Ninth Circuit has like-

[1] "Nor are we impressed with the view that Congress intended that when an industry was engaged in producing munitions of war for the United States under a cost-plus-a-fixed-fee contract and failed to pay an employee engaged in such production his proper wages, that the United States should be required to pay him not only his unpaid wages but also an amount equal thereto as liquidated damages, and, in addition, his attorneys' fees, when another method of safeguarding the employees' rights had been provided which does not entail such a penalty against the United States" (App. R. 22).

wise recognized the principle and cited with approval the decisions of the Second and Fifth Circuits, although holding that on the facts then before it, the principle was not applicable. *Joshua Hendy Corp. v. Mills*, 169 F. (2d) 898 (9 Cir. 1948). In fact, in so far as Federal appellate courts are concerned, the only contrary expression is to be found in the case of *Bell v. Porter*, 159 F. (2d) 117 (7 Cir. 1946), cert. denied 330 U. S. 813, where, however the court decided in favor of the contractor on other grounds. Cf. *Deal & Co. v. Leonard*, 210 Ark. 512, 196 S. W. 2d 991 (1946), and *Raymond v. Parrish*, 30 S. E. 2d 669 (Ga. App. 1944) with *Umthun v. Day & Zimmerman*, 235 Iowa 293, 16 N. W. 2d 258 (1944). These citations are believed to include all decisions of appellate courts except *Hartmaier, et al. v. John C. Long, et al.*, Mo. , S. W. 2d , 17 Labor Cas. ¶65,328 (1949) where the court without discussion followed the decisions of the Court of Appeals for the Eighth Circuit in the *Aaron* and *Powell* cases. Many decisions of the lower Federal courts might also be cited. Among the cases accepting the principle stated above are *Ackerman v. Republic Aviation Corp.*, 8 W. H. Cases 518 (E. D. N. Y. 1949); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn. 1947); *Barksdale v. Ford, Bacon & Davis*, 70 F. Supp. 690 (E. D. Ark. 1947); *Hays v. Hercules Powder Co.*, 13 Labor Cas., ¶64,123 (W. D. Mo. 1947); *Kruger v. Los Angeles Shipbuilding & Drydock Corp.*, 12 Labor Cas., ¶63,660 (S. D. Cal. 1947); *Lynch v. Embry-Riddle Co.*, 63 F. Supp. 992 (S. D. Fla. 1945); *Ritch v. Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D. Wash. 1945), reversed on other grounds, 156 F. (2d) 334 (9 Cir. 1946); *Stewart v. Kaiser Co., Inc.*, 71 F. Supp. 551 (D. Ore. 1947); *Trefs v. Foley Bros., Inc.*, 7 Labor Cas., ¶61,743 (W. D. Mo. 1943); and *Young v. Kellex Corp.*, 82 F. Supp. 953 (E. D. Tenn. 1948).

The development of this doctrine is of considerable interest. In *National Labor Relations Board v. Idaho-Maryland Mines Corp.*, 93 F. (2d) 129 (9 Cir. 1938), the court had to decide whether a company engaged in mining gold and silver was subject to the National Labor Relations Act. It appeared that all of the mining was done in California and the products mined were all delivered to the United States Mint in San Francisco. The court refused to apply the Act, saying (98 F. (2d) at p. 131):

> "Nor is the Board's assumption of jurisdiction warranted by the fact that the United States, after purchasing respondent's product and commingling it with other gold and silver, ships the commingled product from its San Francisco mint to its Denver mint for safe keeping. Respondent does not make these shipments or cause them to be made. We regard such shipments, not as commercial transactions, but as administrative acts of Government."

This distinction between commercial transactions and administrative acts of the Government was recognized in later decisions, some of which dealt with the application of the Fair Labor Standards Act.[16] Notable among the cases applying this doctrine to the transportation of war materiel in time of war is *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949) where the court said, at p. 146:

> "It is urged that materials designed eventually to become component parts of the bomb, brought from beyond the State to Oak Ridge, there to be processed and sent to destinations beyond the State, were in the field of interstate commerce. This contention does

[16] For the development of the doctrine as applied to the mining of gold, see *N. L. R. B. v. Sunshine Mining Co.*, 110 F. (2d) 780 (9 Cir. 1940); *Fox v. Summit King Mines, Ltd.*, 143 F. (2d) 926 (9 Cir. 1944); *Holland v. Haile Gold Mines*, 44 F. Supp. 641 (W. D. S. Car. 1942); and *Walling v. Haile Gold Mines, Inc.*, 136 F. (2d) 102 (4 Cir. 1943).

violence to the stipulation between the parties. These materials were at all times the property of the United States and under the supervision and control of the Army, and were at no time in the custody of a common carrier. Simply stated, the Government brought its own property, in its own possession and under its own control, to Oak Ridge and there processed it for its own use, in its own establishment, designed and constructed for that purpose by its own agents, and then sent it, for its own purposes, under its own control, beyond the State to destinations fixed by it. No element of interstate commerce was involved. There was no buying or selling of these articles, no commercial intercourse between the United States and third parties; no traffic, no market, and no ultimate consumer except the Government itself. There could be no traffic in bomb materials. None of these activities fall under the commerce clause. See The Pipe Line Cases (United States v. Ohio Oil Co.), 234 U. S. 548, 562; 34 S. Ct. 956, 58 L. Ed. 1459. We think that they were all administrative in character, engaged in by the Government in its effort, as stated in the contract, to 'facilitate the prosecution of the war' and to save the country from impending peril. See N. L. R. B. v. Idaho-Maryland Mines Corp., 9 Cir., 98 F. 2d 129, 131. See full discussion in Barksdale v. Ford, Bacon & Davis, Inc., D. C., 70 F. Supp. 690."

To the same effect is *Clyde v. Broderick*, 52 F. Supp. 533 (D. Col. 1943).[17]

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[17] The Court of Appeals for the Tenth Circuit reversed. *Clyde v. Broderick*, 144 F. (2d) 348 (1944). The court found that "there is nothing in the Fair Labor Standards Act which indicates an intent or purpose to exempt from its coverage employees whose activities relate to the movement in interstate commerce of personally owned goods of an employer or goods moving interstate for the convenience of the United States Government". (See 144 F. (2d) at p. 351.) It is clear from the opinion that the Court of Appeals was not discussing a situation where Government-owned goods were involved.

In *Divins v. Hazeltine Electronics Corp.*, 70 F. Supp. 686 (1946), Judge CAFFEY said (at p. 689):

> "Prosecution of a war is not commerce. War is the negation of commerce. Often the purpose of a war and the result, usually, is to impair or destroy commerce, not to carry it on."

On appeal, this language of Judge CAFFEY was approved. *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir. 1947). The Court of Appeals, in an opinion by Judge SWAN, held that employees of a private contractor engaged in installing, servicing and maintaining radar and radio equipment on war ships of various kinds were not covered by the Act. The court limited the application of Judge CAFFEY's doctrine to combat vessels as distinct from "armed cargo transports" and "armed transports". See also *Laudadio v. White Const. Co.*, 163 F. (2d) 383 (2 Cir. 1947), and *Scholl v. McWilliams Dredging Co.*, 169 F. (2d) 729 (2 Cir. 1948).

In *St. John's River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012 (5 Cir. 1947), the court, echoing the remarks of Judge CAFFEY, held that employees engaged in building combat tankers were not employed in the production of goods for commerce.[18] See also the opinion of Judge HICKS in *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949), at pp. 146-147, and particularly the following:

> "The bomb and its component parts were developed for war and not for commerce. The fact, commonly known and judicially recognized, that it was produced secretly and in haste, negatives the idea of commercial intercourse. The use of the bomb as a weapon of war

[18] See also Kennedy v. Silas Mason Co., 164 F. (2d) 1016 (5 Cir. 1947), reversed on other grounds, 334 U. S. 249 (1948), and *Reed v. Murphey*, 168 F. (2d) 257 (5 Cir. 1948), reversed on other grounds, 335 U. S. 865 (1949).

is the antithesis of the regulation of 'Commerce with Foreign Nations'. Such use is not intended to regulate but to destroy commerce."

If the Court of Appeals for the Second Circuit in a series of cases has consistently held to the theory that war activities of the Government itself are not commerce, and if the Courts of Appeals for the Fifth and Sixth Circuits have concurred, and if the Courts of Appeals for the Eighth and Ninth Circuits have, by implication at least, indicated their acquiescence in that view, it may be assumed that there is substance to the contention. Similarly, if the theory of "administrative act" has, over a long period of years, found acceptance not only by the Courts of Appeals for the Sixth and Ninth Circuits, but by other courts as well, it can scarcely be brushed aside as a mere judicial aberration. The fact is that both of these theories may be viewed as different ways of expressing the same central idea and that idea has a hard core of common sense.

When the Government in the prosecution of a war moves combat vessels or atomic bombs or Government-owned munitions across state lines solely for war purposes, the contrast with the movement across state lines of manufactured products in economic competition with other products is so striking that it goes against the grain to throw both activities into the same classification and to hold that an act of Congress, which by its terms was intended to apply only to the latter form of activity, also limits the Government in the performance of a vital function. All of the reasons which lead to the general conclusion that the Fair Labor Standards Act is not applicable to installations such as the Arkansas Ordnance Plant (see supra, pp. 25-39) also support the narrower conclusion that the movement by the Government of the products of such installations to other military installations is not commerce within the meaning of the Fair Labor Standards Act.

(b) Government-Owned Munitions of War Are Not "Goods" Within the Meaning of the Act

This contention may be divided into two general propositions: first, that ammunition produced in plants such as the Arkansas Ordnance Plant is not goods within the general definition of that term used in Section 3(i) of the Act, and second, that such ammunition falls within the exclusory clause in Section 3(i) of the Act, since it was delivered into the actual physical possession of the ultimate consumer prior to the time when petitioners did the work on which they base their claim and prior to shipment across state lines or to foreign ports.

The general definition of "goods" as used in the Act is as follows:

> Section 3:
>
> "As used in this Act—
>
> "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

It will be seen that the language used by Congress is of broad scope. "Wares, products and commodities" are flexible terms. But they do not stand alone. The phrase "or articles or subjects of commerce of any character" colors all that has gone before; the general purpose of the Act requires that this be so. Without undertaking to repeat the arguments advanced under point II, *supra*, we earnestly submit that they furnish strong reason for the conclusion that in defining "goods" Congress had in mind commercial

objects moving in the channels of a competitive economy. We particularly call the court's attention to the thoughtful opinion of the District Court for the Eastern District of Tennessee, Northern Division, in the case of *Young v. Kellex Corp.*, 82 F. Supp. 953 (E. D. Tenn. 1948), where this point is thoroughly examined. The products of the Arkansas Ordnance Plant were not "goods" in this sense. No one bought them and no one sold them. They were no more the subject of trade than war vessels,[29] or tankers,[30] or atomic bombs.[31]

But even if primers, fuzes and detonators can be called "goods", they come within the exclusory clause of Section 3(i), since they were in the actual physical possession of the ultimate consumer during the time that petitioners were working on them. The trial court so found. In its brief the Government strenuously argues the contrary, supporting its argument with references to various portions of the records in these three cases. The respondent could easily follow suit. We submit, however, that no useful purpose would be served by doing so. The question of actual physical possession is a complex one requiring a careful examination not only of contractual provisions but of many other relevant facts. In this case the trial court has performed this task and made definite findings. Those findings, as we have seen are amply supported by the record.[32] The finding of the trial court was not disturbed by the Court of Appeals. Under such circumstances it is

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[29] *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir. 1947); *Kruger v. Los Angeles Shipbuilding & Dry Dock Corp.*, 12 Labor Cas. Para. 63,660 (S. D. Cal. 1947).

[30] *St. John's River Shipbuilding Co. v. Adams*, 164 F. (2d) 1012 (5 Cir. 1947).

[31] *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949); *Young v. Kellex Corp.*, 82 F. Supp. 953 (E. D. Tenn. 1948).

[32] See footnote 8, *supra*, pp. 14-15.

hardly to be supposed that this court will desire to re-examine this tangled question.

Thus we repeat the statement that throughout the process of manufacture, the materials and components which entered into the finished products of the Arkansas Ordnance Plant were in the actual physical possession of the Government. Petitioners were therefore working on goods "after their delivery into the actual physical possession of the ultimate consumer". Wherever that situation has been brought to the attention of the court, it has been held that the exclusory clause of Section 3(i) is applicable. *Divins v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir., 1947); *Kennedy v. Silas Mason Co.*, 164 F. (2d) 1016 (5 Cir. 1947), reversed on other grounds 334 U. S. 249 (1948); *Crabb v. Welden Bros.*, 164 F. (2d) 797 (8 Cir. 1947); *Lynch v. Embry Riddle Co.*, 63 F. Supp. 992 (S. D. Fla. 1945); *Kruger v. Los Angeles Shipbuilding & Dry Dock Corp.*, 12 Labor Cas. Para. 63,660 (S. D. Cal. 1947); *Anderson v. Federal Cartridge Corp.*, 72 F. Supp. 644 (D. Minn. 1947).[33]

Petitioners seek to escape from the logic of this argument by contending that the exclusory clause of Section 3(i) was intended to apply only to transportation by the ultimate consumer. The real purpose of the clause was, so they argue, to protect from the penalty of Sections 15(a)(1) and 16 persons who might innocently deal with goods that had been produced in violation of the Act.

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[33] There are a number of cases in which it has been held that the Fair Labor Standards Act is applicable in situations substantially similar to that which exists in the present case. *Jackson v. Northwest Air Lines*, 75 F. Supp. 32 (D. Minn. 1947); *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28 (S. D. Iowa 1943); and *Ewthun v. Day & Zimmerman, Inc.*, 235 Iowa 293, 16 N. W. 2d 258 (1944), are perhaps the leading cases. In none of those cases does it appear that consideration was given to the argument made above.

If the petitioners' construction of the statute is correct, it seems remarkable that Congress did not accomplish its purpose by the simple method of writing into Section 15(a) an exemption in favor of the innocent transporter. It is even more remarkable that in recently amending the Fair Labor Standards Act, Congress actually did alter Section 15(a) so as to protect the innocent transporter, while at the same time leaving Section 3(i) undisturbed. (See Section 13(a) of the Act of October 28, 1949, c. 736, public 393, 81st Cong., 1st Sess., et seq.). This recent act is, we submit, a sufficient demonstration of the correctness of the opinion previously expressed by Judge SWAN that there is "nothing * * * in the legislative history to indicate that this was the only purpose or that the statutory definition of 'goods' is not to be given effect in determining the coverage of the Act."[34] On the contrary, we believe that the legislative history makes it abundantly clear that the express object of the exclusory clause of Section 3(i) was not only to exempt work done on goods after their delivery to the ultimate consumer *but likewise to confer immunity on the producer of goods whose product came into the hands of the ultimate consumer before any movement across state lines.*

The Act explicitly says that "after their delivery into the actual physical possession of the ultimate consumer" articles are no longer "goods". Since they are no longer "goods", there are no "goods" moving in commerce. It would certainly seem to follow that no goods are "produced for commerce". Since the record in this case is clear (supra, pp. 14, 15) that the finished products of the Arkansas Ordnance Works were delivered into the actual physical pos-

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[34] *Dizon v. Hazeltine Electronics Corp.*, 163 F. (2d) 100 (2 Cir. 1947) at p. 104.

session of the Ordnance Department prior to shipment from the plant, this fact alone would appear to bring the exclusory clause into operation.

The result achieved by this literal application of the statute accomplishes one of the important objects of this legislation. When the Act is read in its entirety, it is clear that Congress intended to exempt from its requirements business essentially local in character. Such, however, was the sweep of the definition of commerce and of production contained in the Act that it was difficult to imagine any manufacturing business, however petty or local, to which the Act would not apply since in practically every conceivable case some customers in the course of consuming the product might be expected to take it out of the state, and this by itself would bring the Act into operation, however small the fraction of the total product which would move interstate. *Mabee v. White Plains Publishing Co.*, 327 U. S. 178 (1946).

The solution devised by the draftsman of the Act was to exempt those manufacturers whose entire product reached the ultimate consumer in the state of manufacture. It is hard to conceive of a more apt method of exempting local enterprise while at the same time preserving the application of the Act in the field where federal intervention was necessary to achieve the broad purposes of the Act.

It is entirely consistent with this interpretation of the Congressional purpose that the ultimate consumer exemption was later qualified by adding the words "other than a producer, manufacturer or processor thereof". The producer of goods which are thereafter to be transported for the purpose of consuming them in further manufacture in other states is not an essentially local enterprise such as Congress desired to exempt. The fact that delivery is

made to the purchaser before transportation is, in such a case, a fortuitous circumstance.

From the very beginning of the hearings on the Fair Labor Standards Act, Congress was concerned to avoid its application to local business. See *Kirschbaum v. Walling*, 316 U. S. 517 (1942); *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1942); *10 East 40th Street Building v. Callus*, 325 U. S. 578 (1945). That such an exemption was contained in the bill as originally presented to Congress by the Administration is shown by the testimony of Assistant Attorney General Robert H. Jackson[*] given at joint hearings before the Senate Committee on Education and Labor and the House Committee on Labor on the original bill from which the Fair Labor Standards Act was derived. The pertinent testimony is as follows:

> "*The Chairman:* * * * Would you explain under just what circumstances and under what circumstances only, it would be possible for the regulation of retail establishments *and small business enterprises* to come under this bill?
>
> "*Mr. Jackson:* I will try to. It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the *pants presser and small business generally.* * * *.
>
> "* * *
>
> "But then, there are only two ways in which a retailer, for example, would be affected by this bill as it now stands, * * *. One would be the retailer who is located close to a State line and sold his goods by delivery across a State line, and the other would be the case of a local retailer, who by his labor practices and standards was able to affect the interstate movement of goods. * * *.

[*] Quoted by Mr. Justice BURTON in *Roland Electrical Company v. Walling*, 326 U. S. 657, 670 (1946).

"* * *

"Practically, the situation in which a local merchant might be affected would be *if he* were moving his goods *in the course of delivery* across the State line to a substantial extent so that he were engaging in inter-state commerce; but generally speaking, the policy of the bill is not to include the *service trades* and *small business* and the retailing enterprises." (Italics supplied.)

The report of the Senate Committee on Education and Labor is to the same effect (Sen. Rep. No. 884, 75th Cong., 1st Sess., p. 5):

"The bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce. For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States."

These authoritative expositions of the purposes of the legislation certainly indicate that the Act then under consideration contained provisions adequate to accomplish that purpose. *But as the Act then stood, no provision other than the ultimate consumer clause could have been relied on to accomplish such a result.* The retail and service establishment exemptions were not in the administration bill when the Assistant Attorney General was explaining it to the Committee or when the Committee report was made.

Moreover, those exemptions, as they were embodied in the bill ultimately passed, were not broad enough in scope to justify the statements made in the Committee report. Thus the shoemaker, the tire retreader, the custom tailor, and the baker were neither retail nor service establishment within the meaning of the Act. (See Administrator's Interpretative Bulletin No. 6). Yet these small business men are clearly the very types of that local enterprise to which the Committee had reference.

Moreover, there is no room for doubt that the exclusory clause was actually intended to grant immunity to the producer of goods which were all delivered to the ultimate consumer prior to their movement across state lines; for the application of the Act, as originally drawn, to the producer was wholly dependent upon the subsequent transportation of the goods across state lines in violation of the Act. (See S. 2475 introduced May 24, 1937, 75th Congress, 1st Session.) Section 7, paragraph (a) of the original bill made it unlawful to transport across state lines any goods produced under standards lower than those set by the Act. Paragraph (b) made it unlawful to transport goods into any state if to do so violated labor-standard laws of that state. Paragraph (c), covering producers of goods, provided:

> "It shall be unlawful for any person to employ under any substandard labor conditions any employee engaged in interstate commerce or in the production of goods intended for transportation or sale *in violation of subsection (a) or (b)* of this section."

The "ultimate consumer" clause, which was in the original draft, clearly permitted ultimate consumers to take any goods, however produced, across state lines without violating the Act. But unless it could be shown that goods were produced with the intent that they be transported

across state lines in violation of the Act, the producer was not covered under paragraph (c). This remained equally clear under the coverage provisions as reworded by the Senate Committee. Thus the "ultimate consumer" clause exempted producers precisely as it now would if given the interpretation for which we contend.

Nothing in subsequent legislative history of the act suggests that the purpose of the clause was altered. As Mr. Justice BURTON said of the act in *Roland Electrical Company v. Walling*, 326 U. S. 657 (1946) p. 671:

> "While its language and coverage were changed in details, the Bill did not depart substantially from its original purpose. This purpose remains the key to the meaning of the words defining its coverage and also to those defining exemption from its coverage."

Such changes as Congress made in the exclusory clause support the view that it was intended to exclude from coverage the producer and not the ultimate consumer alone. As originally introduced in the Senate, the definition of "goods" provided that it "shall not mean goods in the possession of the ultimate consumer thereof". (S. 2475, introduced May 24, 1937, 75th Cong. 1st Sess., §2(a)(21)). As passed, however, the exclusion was limited to "goods after their delivery into the actual physical possession" of the ultimate consumer. This was intended to emphasize the fact that the exemption did not apply where the consumer had mere title when the goods moved in commerce. The word "after" was evidently used to make it clear that the producer was not excluded from coverage unless the ultimate consumer got the product before it crossed the state lines.

If, as we contend, the effect of the ultimate consumer clause was to grant immunity to producers whose goods were all delivered to the ultimate consumer prior to their

movement across state lines, there was reason for Congress to be concerned lest the provisions of the Act be evaded on a wholesale scale by the simple process of transferring title prior to interstate shipment. If, on the other hand, petitioners' contention be accepted that the Act confers immunity only on the ultimate consumer, then it is difficult to understand why Congress should have seen fit to limit the exemption to actual possession. No reason appears why Congress should have wished to exempt ultimate consumers who themselves transported "hot goods" while leaving subject to the provisions of the Act ultimate consumers who had mere title to "hot goods" actually transported across state lines by someone else.

It may be conceded that Congress in granting immunity to the producers of goods delivered into the actual physical possession of ultimate consumers prior to transportation across state lines was thinking about business that was small as well as local. The members of Congress certainly did not envisage the possibility that vast quantities of munitions would be produced at Government installations by private contractors and delivered into the actual physical possession of representatives of the Government prior to any movement across state lines. But this argument, which seems to us to have great force, proves too much to be of any help to petitioners, for it leads directly to the conclusion that none of the provisions of the Act should be held to apply to the new and unique operation which the Arkansas Ordnance Plant typifies.

Petitioners assert that the meaning which they ascribe to the ultimate consumer clause has been the consistent interpretation of the Wage and Hour Division and has been upheld by numerous court decisions. This deserves analysis. The interpretation in question appears in Interpreta-

tive Bulletin No. 5. In that interpretation the Administrator gave first place to the contention that a consumer who uses commodities in connection with the production or shipment of goods for commerce is not the ultimate consumer; that "the ultimate consumer of a shoe box is not the manufacturer of the shoes but the man who buys and wears the shoes". In cases in which this reason was sufficient to deny exemption, the Administrator has found support from the decisions. See *Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165 (4 Cir. 1942); *Chapman v. Home Ice Co.*, 136 F. (2d) 353 (6 Cir. 1943). It should be observed that this theory alone restricts the ultimate consumer exemption so narrowly as to make certain that, except where Government purchases and transportation are concerned, no substantial body of employees will be denied the benefits of the Act.

The Administrator, however, was not content with the proposition above stated and sought by interpretation to limit the clause so as to protect the ultimate consumer only. At this point judicial support for the views of the Administrator is noticeably lacking. In addition to the cases previously cited (supra p. 70), see *Walling v. Reuter, Inc.*, 137 F. (2d) 315 (5 Cir. 1943), judgment vacated without passing on the point in question, 321 U. S. 671 (1944).

Moreover, the claim of consistency of interpretation by the Administrator is based on what the Wage and Hour Division has said and not on what it has done. The reported cases reveal no enforcement cases against small local enterprises like the custom tailor whose establishment is covered, under the Government's interpretation of the "ultimate consumer" clause, solely because the tailor knows that his customers sometimes leave the State and wear clothes when they do so. The incongruities to which the Wage and Hour Division's interpretation of the "ultimate consumer"

clause would lead it are not reflected in its enforcement policy, so far as the cases reveal.[*]

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[*] That the Wage and Hour Division must sometimes adopt an uncharacteristic see-no-evil attitude in order to maintain a theoretical consistency is reflected by its answer to the following question:

"Question: A custom tailor in this area is engaged in making uniforms to order for soldiers stationed at a local camp. All the uniforms are delivered locally, but the soldiers who buy them do so with the expectation of transporting them and wearing them outside the state. In paragraph 6 of Interpretative Bulletin No. 5, you hold that employees engaged in building a boat for delivery to the purchaser at the boatyard are covered by the Act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe the purchaser will sail it outside the state [1942 WH Man. 26]. It would seem that the employees of the custom tailor would fall under the same rule.

"Answer (Acting Solicitor of Labor): In our opinion, no coverage should be asserted in this situation. In our memorandum to you dated August 11, we expressed the view that employees of custom tailors are within the general coverage of the Act if they are engaged in work on goods which the employer expects and intends to send out of the state, either in the form of the shipment of the finished product to the customer, or in the form of the shipment of partially processed goods to a manufacturer located outside of the state. We believe that coverage should be limited to these situations, and that a custom tailor making an intrastate shipment of clothes or uniforms to the ultimate customer should not be held within the Act on the ground that the customer might wear the clothes outside the state of manufacture. It would seem that the expectation of an interstate movement of the goods in this case is more conjectural than in the boat-building illustration in paragraph 6 of Interpretative Bulletin No. 5, to which you refer." 1943 Wage and Hour Manual, p. 41.

An Editor's Note in 1942 Wage and Hour Manual 345 states that the Wage and Hour Division's position is that a tire-retreading enterprise is covered if the tires are retreaded "with hope, intent, or reason to believe that they will move in interstate commerce" but that the business is strictly local, and not covered, if all recapped or retreaded tires are sold within the state. The implication appears to be that retreaded tires can be sold to ultimate consumers without any reason to believe that any of them will cross state lines. While the Editor's Note is unofficial information, we find no record of enforcement to show that the Administrator has taken a contrary position.

It is no answer to say that the goods upon which petitioners were working were used to produce other goods. Were the end products objects of commerce, the argument might have force. In that case the goods would be consumed in producing other goods, as they were consumed in shipping other goods in the *Hamlet Ice Company* and other cases cited, *supra*, at page 85. But here, as has been seen, neither the primers, detonators and fuzes were goods, nor the shells into which they were ultimately to be incorporated, just as the war ships in the *Divins* case were not goods, if for no other reason because they themselves were in the actual physical possession of the ultimate consumer before crossing state lines. Thus petitioners were not working on goods which were used to produce other goods. By the same token, the ultimate consumer is not a "producer, manufacturer or processor" within the exception to the exclusory clause. If this were not so, it would be hard to escape the conclusion that the Government was the producer, and hence that petitioners were employees of the Government and therefore not employees within the meaning of the Act.

V.

The Petitioners Were Employees Of The United States

Section 3(d) of the Fair Labor Standards Act provides that the word "employer" as used in the Act "shall not include the United States". Section 3(e) defines an "employee" as "any individual employed by an employer". A majority of the courts which have considered the question have reached the conclusion that employees working in installations such as the Arkansas Ordnance Plant are not employees within the meaning of the Act because their real employer is the United States. See *Kennedy v. Silas*

Mason Co., 164 F. (2d) 1016 (5 Cir. 1947);[7] *Selby v. J. A. Jones Const. Co.*, 175 F. (2d) 143 (6 Cir. 1949); *Crabb v. Welden Bros.*, 164 F. (2d) 797 (8 Cir. 1947).

In *United States v. United Mine Workers*, 330 U. S. 258 (1947), this court had to decide whether coal miners working in mines which had been seized by the Government under the authority of the War Labor Disputes Act were employees of the Government and as such not within the ambit of the Norris-LaGuardia Act. Chief Justice VINSON said (at p. 285):

> "The question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the Federal Government for every purpose which might be conceived, but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of Governmental employer and employee."

The essentially similar question presented by the present record is whether, for the purposes of this case, the incidents of the relationship existing between the Government and petitioners are those of Governmental employer and employee. Those incidents of the relationship deemed pertinent in the *United Mine Workers* case are at least equally pertinent here. In the *United Mine Workers* case the question was whether the Norris-LaGuardia Act should be construed to permit an injunction against an organized work stoppage impeding a "vital and urgent function of the Government". Although the statutory withdrawal of jurisdic-

[7] Reversed on other grounds, 334 U. S. 249 (1948). See also *Reed v. Murphey*, 168 F. (2d) 257 (5 Cir. 1948), reversed on other grounds, 335 U. S. 865 (1949), and *Creel v. Lone Star Defense Corp.*, 171 F. (2d) 964 (5 Cir. 1949), cert. granted 337 U. S. 923 (1949).

tion from the courts to grant injunctive relief in labor disputes made no express exception where the Government was the employer, this court found that it was not the legislative purpose to impede the Government itself in the accomplishment of its own sovereign purposes. In the light of that purpose, drawn by inference from legislative history, the miners were held to be employees of the United States.

The Fair Labor Standards Act expressly provides that it is not to apply where the United States is employer. The purpose to leave the Government's own sovereign activities free of the restraints of the Act need therefore not be found by inference. Wartime production of ammunition in a Government-owned plant was as vital a Government function as any readily conceived. Yet if the arguments of petitioners are to be accepted, the shipment of ammunition from the plant over state lines was unlawful and subject to injunction under the Fair Labor Standards Act (supra, pp. 38-39). That the question of the Act's coverage arises in a suit for wages should not obscure the issue as it would have been presented if the Administrator had sued to enjoin shipment of ammunition produced in violation of the Act. It is, of course, inconceivable that he should have done so, and yet the fact that the power existed under the Act is a forceful indication that the Act was not intended to cover in these circumstances. To find coverage in this case is to frustrate the purpose of the exemption intended to apply where the Government is employer and to do so because of the merely formal circumstance that respondent was employer in name and in name only.

The facts previously stated (supra pp. 11-15) taken together with the provisions of the contract between respondent and the United States (S. R. 21-73) and the Statement

of Labor Policy (see Appendix B to this brief) and the instructions published from time to time by the War Department add up to a definite pattern of government control in all essential respects equivalent to that which led this court to hold the workers in the seized mines to be employees of the Government. This general conclusion finds detailed support in the record. Thus, before any of the petitioners were employed at the Arkansas Ordnance Plant, the Government approved a list of job classifications and a schedule of wages applicable to each (S. R. 19). Before any employee could be paid, written approval of his employment by the Government was required (S. R. 14). Exhibit 6(a) (S. R. 101) illustrates the strict enforcement of this requirement by the Government.

All changes in status of employees either in classification or in wage rates, required written approval of the Government (S. R. 14, 155, 157). These reservations of authority by the Government were constantly exercised. As an illustration, the contractor experienced difficulty in hiring janitors at the approved rates, yet it could not on its own motion increase the authorized rate and its request to the Government for a change in rates was denied (Ex. 5, S. R. 90-97). Exhibit 6 (S. R. 97-101) is a similar illustration dealing with laborers. These two examples make it evident that the contractor was given no discretion, even on the lowest levels, in the employment of persons to man the plant.

Ordnance Procurement Instruction 9.107.1 (Ex. G, S. R. 164) specifically provides for Government approval of wages. The commanding officer of the Arkansas Ordnance Plant emphasized this fact by letter to the contractor dated November 26, 1942, reading in part as follows:

"3. Your attention is further invited to the fact that all requests or problems pertaining to wage or salary

adjustments are to be submitted to the Commanding Officer, and where his authority is not sufficient to apply, same shall be channeled to higher authority in accordance with previously issued instructions." (Ex. I, S. R. 166).

The control exercised by the Government extended to minutest details. We have mentioned janitors' and laborers' wages. The same approval was required for procurement of additional small items of equipment for the plant. This is exemplified by Exhibit 8 (S. R. 103). On occasion the contractor thought that additional equipment should be installed but the Government in the exercise of its reserved powers refused permission for its installation (Ex. 9, S. R. 105). On the other hand, the Government often required installation of new equipment that its experts recommended even though the contractor may have deemed it unnecessary (Ex. 7, S. R. 102).

The Government's control and supervision did not stop there. It maintained checkers at the clock houses where employees clocked in and out (S. R. 14), it audited and approved each time card (S. R. 14), and even maintained a force of men to observe payroll payments to employees (S. R. 14). Exhibit D-3 (S. R. 159) is a reproduction of two typical time cards and illustrates the Government approval required. Exhibit D-4 (S. R. 161) shows that the Government records were in sufficient detail to enable it to reconstruct a lost time card. Even then, the Government control was not ended. Each payroll had to be approved by the Government (Ex. D-1 and D-2, S. R. 155-157).

Petitioners attach great significance to a provision of the contract which specifies that employees at the plant shall be subject to the control and shall constitute employees of the contractor (S. R. 41), but this court had held such a

contractual provision not to be controlling. *Rutherford Food Corporation v. McComb*, 331 U. S. 722 (1947). In *McComb v. McKay*, 164 F. (2d) 40 (8 Cir. 1947), it was held that certain employees were not within the coverage of the Fair Labor Standards Act because they were employees of a railroad. In that case the Administrator argued that the appellees had entered into a contract to furnish labor which specifically stated that "the contractors are masters in respect to all the work done by them as herein provided, and the contractors' servants and employees are not the servants and employees of the railroad company in any particular whatsoever". Notwithstanding this provision of the contract, the District Court found that the appellees were not independent contractors and the Court of Appeals affirmed in an opinion by Judge SANBORN in which the facts are set out in considerable detail.

We think that a much more significant clause of the contract is to be found in Article VII-N (S. R. 68). That clause provides that the contracting officer shall decide all disputes covering questions of fact arising under the contract, subject to written appeal to the Chief of Ordnance, or, in certain limited cases, to the Secretary of War or his duly authorized representative. It provides that in the meantime the contractor shall diligently proceed with the work as directed. This provision gave to the representatives of the War Department even broader powers than those possessed by the Secretary of the Interior over the seized mines in the *United Mine Workers* case, 330 U. S. 258 (1947).

It is submitted that the present case is controlled by that decision. The similarity between that case and the case presented by the present record may be demonstrated by a comparison in which the facts relied on by this court in the *United Mine Workers* case to support the conclusion

that the miners were employees of the Government are set forth in column 1, and the facts in the present record are set forth in column 2.

Column 1	*Column 2*
1. In operating the seized mines the government was engaged in a "vital and urgent government function".	1. In producing at the Arkansas Ordnance Plant munitions for the protection of the nation in time of war the government was engaged in an even more vital and urgent government function.
2. Congress intended that by government seizure a mine should become, for purposes of production and operation, a government facility in as complete a sense as if the government held full title and ownership.	2. The government actually had full title and ownership of the Arkansas Ordnance Plant, and in addition had title and ownership of all finished products, materials, and work in progress therein.
3. The government provided procedures for adjusting wages and conditions of employment.	3. The government did likewise with respect to the Arkansas Ordnance Plant and retained full control over such matters.
4. Executive Order 9728 authorized the Secretary of the Interior to negotiate with workers	4. Under the respondent's contract the Secretary of War reserved the authority to control

Column 1 (Cont'd.)	*Column 2 (Cont'd.)*
and the Krug-Lewis Agreement related to matters which normally constitute the subject matter of collective bargaining.	every aspect of labor relations, and this authority was exercised in the Statement of Labor Policy which was negotiated with representatives of labor and which covered matters ordinarily the subject of collective bargaining.
5. The opinion points out the fact that Lewis referred to the operators as "strangers to the Krug - Lewis Agreement."	5. By the same token in the Statement of Labor Policy the CIO and AFL recognized government control over the Arkansas Ordnance Plant.
6. Under the regulations, the operating managers could be removed at the discretion of the government.	6. The same is true by contract provision with respect to removal of Ford, Bacon & Davis, Inc. (Art. VI-A (S. R. 59-61)).
7. The government, though utilizing the services of private managers, has neverthless retained ultimate control.	7. The same situation exists at the Arkansas Ordnance Plant by virtue of the contract between the government and Ford, Bacon & Davis, Inc.
8. The government endeavored to operate the mines for the account	8. At the Arkansas Ordnance Plant the government specifically obli-

Column 1 (Cont'd.)	*Column 2 (Cont'd.)*
and at the expense of the owners (a fact somewhat inconsistent with the employer-employee relationship). The court without deciding the issue, questioned the government's right to thus limit its liability.	gated itself for all expenses; and the private managers had no chance for profit or risk of loss.

It is apparent from a comparison of the two columns above that every fact found by the court to exist in the *Mine Workers Case* is present in equal or greater degree in the case at bar. In addition, the Government maintained a multitude of controls at the Arkansas Ordnance Plant that do not appear to have been retained by the Government with respect to the seized coal mines.

In the *United Mine Workers Case*, supra, Mr. Justice BLACK and Mr. Justice DOUGLAS concurred with the majority of the court in holding that the miners became Government employees when the Government took over the mines. They said (330 U. S. at p. 329):

> "The fact that it utilizes the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

So here, the fact that the Secretary of War saw fit to exercise the power conferred upon him by the Act of June 2, 1940, to operate the Arkansas Ordnance Plant through the agency of a qualified commercial manufacturer under

a contract entered into with that manufacturer does not detract from the Government's complete authority. The Government might at any time have terminated the contract and have operated the Arkansas Ordnance Plant without the benefit of the management services of the respondent. In many substantially similar plants, such as the Pine Bluff Arsenal at Pine Bluff, Arkansas, the Secretary of War deemed private management services unnecessary.

The form which Government takes in the operation of its war plants, and the motives which lead it to conduct its activities through the agency of a private contractor, are wholly irrelevant to the issue of the actual relationship between Government and these petitioners. Compare *Inland Waterways Corp. v. Young*, 309 U. S. 517, 523 (1940); *Cherry Cotton Mills v. United States*, 327 U. S. 536 (1946); *Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381 (1939); *United States v. Wittek*, 337 U. S. 346 (1949).

Liability for the payment of any judgment rendered in favor of these petitioners is upon the Government, to be paid from Government funds. We submit that form should give precedence to fact in resolving the legal incidents of the relationship between Government and the petitioners.

The Government relies mainly on *Alabama v. King & Boozer*, 314 U. S. 1 (1941). The question for decision in that case was whether the Alabama sales tax with which the seller is chargeable but which he is required to collect from the buyer could be collected from a partnership selling lumber to a cost-plus-a-fixed-fee contractor who was engaged in constructing an army camp for the United States. This, in turn, depended on whether the Government "became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity." (314 U. S. at p. 10). This court held that the Government was not bound by such

contracts made by the contractor "but was obligated only to reimburse the contractor when the materials purchased should be delivered, inspected and accepted at the site" (314 U. S. 11). After reviewing the evidence showing the very extensive control by the Government over the activities of the contractor, Chief Justice STONE said (314 U. S. at p. 13):

> "But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S. 415, 421; *United States v. Driscoll*, 96 U. S. 421. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. Cf. *James v. Dravo Contracting Co., supra; United States v. Driscoll, supra.*
>
> "We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax."

We think the irrelevance of this case to the issues now before this court is apparent. Whether a transaction is constitutionally immune from state taxation is an extremely complex question involving considerations of a very special character. Cf. *United States v. Allegheny*

County, 322 U. S. 174 (1944). Nor does the result arrived at in the *King & Boozer* case, that for purposes of pledging its credit the contractor was not an agent of the Government, throw much light on the problem here. As Chief Justice STONE pointed out, the extent of control in other respects was not in issue in the *King & Boozer* case.

To avoid repetition, it may simply be said that *Curry v. United States*, 314 U. S. 14 (1941), which applied the doctrine of *King & Boozer* to uphold a state tax on the use of materials in the construction of the same army camp, is distinguishable for similar reasons. In that case, as the court pointed out, the statute was not applied to transactions of the contractor on the camp site (314 U. S. p. 18).

Buckstaff Co. v. McKinley, 308 U. S. 358 (1939), upon which the Government relies, is even more evidently distinguishable. The corporation which there sought to enjoin collection of a tax imposed pursuant to a state unemployment compensation law was engaged in the operation for profit of a bath house on a Government reservation. The court held that the corporation was not, within the meaning of the Social Security Act, an instrumentality of the United States. Mr. Justice DOUGLAS said (308 U. S. at p. 362):

> "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & Deposit Co. v. Pennsylvania*, 240 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner 'is engaged in its own behalf, not the government's, in the conduct of a private business for profit.' See *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 23. Though it acts with the Government's permission and has received a privilege from

the Government, it does not exercise that privilege on behalf of the latter. See *Broad River Power Co. v. Query*, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise. See *Federal Compress & Warehouse Co. v. McLean, supra.* That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality. See *James v. Dravo Contracting Co.*, 302 U. S. 134, 149. In effect, petitioner concedes the point by admitting its liability under the Social Security Act."

In *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U. S. 398 (1946), the determination that the guards at a private plant engaged in war production were still employees of the respondent within the meaning of the National Labor Relations Act involved wholly different issues. There the only basis for the contrary claim was that the guards had been "militarized". In all other respects the private employer appeared to have retained the normal measure of control over its employees. Mr. Justice MURPHY said (331 U. S. 398 at p. 413):

> "In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked,

as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present."

As we have seen, in the present case it is the government which determines wages and hours and which bears the burden of the wages and receives the benefit of the hours worked.

VI.

Petitioners' Claims Were Barred by the Portal-to-Portal Act of 1947

The complaint makes it clear that petitioners' claim is essentially one for walking time and other activities preliminary and postliminary to scheduled working hours. Nowhere in the complaint is there an allegation of the existence of any written agreement or of any custom pursuant to which such time is compensable. The affidavits filed in support of the motion for summary judgment negative the existence of any such contract or custom. The affidavits filed in support of the response to the summary judgment, while creating some uncertainty as to the exact nature of the work upon which the claim is based, are insufficient to establish the existence of any such contract or custom. Applying the plain language of Section 2 of the Portal-to-Portal Act of 1947, the petitioners' claim is barred, and the judgment of the trial court should be affirmed on this ground alone.

Similarly, the affidavits filed in support of respondent's motion for summary judgment clearly established reliance in good faith on rulings of the Ordnance Department as the basis on which petitioners were paid compensation. Section 9 of the Portal-to-Portal Act of 1947 thus affords an additional bar to the claim of petitioners.

Conclusion

The overwhelming majority of the courts which have considered the question have found it impossible to conclude that the provisions of the Fair Labor Standards Act have application to the production by the Government of war materiel in its own munition plants, even though the services of private contractors may have been used to operate the plants. There is simply no sensible reason why the Act should be held to apply in such a situation. The attempt to invoke literal definitions of the statute for the purpose of achieving a result clearly not intended by Congress is self-defeating, for those definitions, if strictly applied, lead to the conclusion that the products of these plants are not technically "goods" within the meaning of the Act.

It does not follow that petitioners and those in like position were without protection against exploitation. The control which the Government was in a position to exercise and did exercise over the wage scale paid in these plants was comprehensive, and the provisions of the Walsh-Healey Act were expressly made applicable to those who worked there. Apart from these considerations, the thrusts of a war economy were alone sufficient to guarantee that every munitions worker would receive either in overtime pay or in salary the equivalent of time and a half for all overtime actually worked. The record in this case leaves no doubt that petitioners were compensated on that basis and that their claim is without substantial merit.

It is therefore respectfully submitted that the decision of the court below should be affirmed.

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APPENDIX A

THE PERTINENT PROVISIONS OF THE WALSH-HEALEY PUBLIC CONTRACTS ACT OF JUNE 30, 1936, (C. 881, 49 STAT. 2036; 41 U. S. C. §35, ET SEQ.) ARE AS FOLLOWS:

Section 1:

"That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, * * * for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

"(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

"(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the con-

tract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: * * *"

Section 2:

"That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 of this Act may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year

from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America."

Section 5:

"* * * on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. * * * and shall make findings of fact after notice and hearings, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act."

Section 6:

"Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide rea-

sonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided*, That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 1 of this Act."

Section 9:

"This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; * * *"

THE PERTINENT PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938 [ACT OF JUNE 25, 1938, C. 676, 52 STAT. 1060, 29 U. S. C. §201, ET SEQ.] ARE AS FOLLOWS:

Section 2:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce;

(3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

Section 3:

"As used in this Act—

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

"(e) 'Employee' includes any individual employed by an employer."

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Section 6:

"(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(3) after the expiration of seven years from such date, not less than 40 cents an hour, * * *.

Section 7:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 15:

"(a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

"(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce

is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, * * * "

Section 16:

"(a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Section 17:

"The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other pur-

poses', approved October 15, 1914, as amended (U. S. C. 1934 edition, Title 28, sec. 381), to restrain violations of section 15."

Section 18:

"No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provisions of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under * * *."

THE PERTINENT PROVISIONS OF THE NATIONAL DEFENSE ACT OF JULY 2, 1940 (C. 508, 54 STAT. 712, 50 U. S. C. APP. §§1171, 1172 AND 5 U. S. C. §189(A).

"An Act

To expedite the strengthening of the national defense

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facili-

ties at privately owned plants and the expansion of such plants, and the acquisition of such lands, and the purchase or lease of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; and (3) to enter into such contracts (including contracts for educational orders, and for the exchange of deteriorated, unserviceable, obsolescent, or surplus military equipment, munitions, and supplies for other military equipment, munitions, and supplies of which there is a shortage), and to amend or supplement such existing contracts, as he may deem necessary to carry out the purposes specified in this section: *Provided*, That the limitations contained in sections 1136 and 3734 of the Revised Statutes, as amended, and any statutory limitation with respect to the cost of any individual project of construction, shall be suspended until and including June 30, 1942, with respect to any construction authorized by this Act: *Provided further*, That no contract entered into pursuant to the provisions of this section which would otherwise be subject to the provisions of the Act entitled 'An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes', approved June 30, 1936 (49 Stat. 2036; 41 U. S. C. secs. 35-45), shall be exempt from the provisions of such Act solely because of being entered into without advertising pursuant to the provisions of this section: *Provided further*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used under this section; but this proviso shall not be construed to prohibit the use of the

cost-plus-a-fixed-fee form of contract when such use is deemed necessary by the Secretary of War.

"(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and, when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412). * * *

"Sec. 4(b). Notwithstanding the provisions of any other law, the regular working hours of laborers and mechanics employed by the War Department, who are engaged in the manufacture or production of military equipment, munitions, or supplies shall be eight hours per day or forty hours per week during the period of any national emergency declared by the President to exist: *Provided*, That under such regulations as the Secretary of War may prescribe, such hours may be exceeded, but compensation for employment in excess of forty hours in any work-week, computed at a rate not less than one and one-half times the regular rate, shall be paid to such laborers and mechanics."

THE PERTINENT PROVISIONS OF THE PORTAL-TO-PORTAL ACT OF 1947 [ACT OF MAY 14, 19.., C. 52, 61 STAT. 84, 29 U. S. C. §251, ET SEQ.] ARE AS FOLLOWS:

Section 1:

"(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers

and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

"The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

"The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted. * * *

"(b) It is hereby declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils: (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts."

Section 2:

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or

after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District

of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

Section 9:

"In any action or proceeding commenced prior to or on or after the date of the enactment of this Act, based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

APPENDIX B

Statement of Labor Policy Governing Government-Owned, Privately-Operated Plants.

Congress has charged the War and Navy Departments with the responsibility for the operation of nearly 100 giant Government-owned munitions plants, the backbone of the Nation's armament program. Under the terms of the Congressional Mandate, the War and Navy Departments had the option of themselves operating the plants or operating them through the agency of selected qualified commercial contractors. In order fully to utilize the labor and management resources of the Nation and to minimize encroachment upon the country's industrial structure, the two Departments chose the latter course. The industrial units thus created are unique.

All are owned outright by the United States, and all but a very few are located upon military reservations. All are engaged solely in war production—the manufacture and loading of explosives and ammunition, the assembly of bombers and the fabrication of guns and other munitions. In all of the plants the work performed is of a secret or confidential nature, and in many of them it is highly hazardous. All are operated by private contractors under "Management Service" contracts, any of which may at any time be terminated by the Government if it should decide either to operate the plant itself or to entrust its operation to another contractor. The normal factors which go to make up commercial profit are lacking. The Government had title to the product at all times. It pays the contractor a fixed fee for its services which fee is unaffected by wages or other costs, production delays or stoppages. The Gov-

ernment reimburses the contractor for all costs, including wages, and in most instances must approve such costs, including wage scales, in advance. The Army or Navy officer in charge may direct the discharge of any employee if he deems it to be in the public interest. These plants embody a new and unique tripartite relationship among Government, labor, and management. They are sufficiently different from traditional Government establishments so that existing Government policies regulating labor relations are not entirely suitable.

Recognizing these facts, and desiring to preserve the greatest freedom of organization and collective bargaining by the employees which is compatible with the necessary discharge by the War and Navy Departments of their responsibility for maximum production and the safe and efficient operation of these plants, the War Department and the Navy Department have established the following labor policies to which the American Federation of Labor and the Congress of Industrial Organizations have agreed after assisting in their preparation. It is recognized that these policies do not cover all aspects of labor relations in these plants, and experience may indicate the desirability of modifying, adding to, or otherwise amending this statement of policy.

1. No employee or person seeking employment shall be discriminated against by reason of race, color, creed, or sex.

2. The recognition of an exclusive bargaining agent for the employees in any appropriate bargaining unit within any plant will be deferred until a majority of the estimated total of that unit has been hired, unless special circumstances shall justify an earlier designation of such exclusive bargaining agent. The War and Navy Departments will undertake to estimate with reasonable promptness the total employee complement of the appropriate unit.

3. While no recognition shall be accorded any organization as the exclusive representative of any group of employees until the proper collective bargaining agency shall have been determined under the conditions described above, provision will be made for the handling of grievances and other disputes, and the elimination of friction between employees and management during the period pending such determination. These procedures should be approved by the representative of the Army or Navy in charge of operations at the plant.

4. Seniority shall be a determining factor in matters affecting layoff and reemployment, transfers, demotions and promotions only if other factors of ability and aptitude are equal.

5. (a) Discharges directed by the War or the Navy Departments for suspicion of subversive activities will be handled in accordance with the provisions of the "Joint Memorandum on Removal of Subversives from National Defense Projects of Importance to Army or Navy Procurement", dated January 10, 1942.

(b) Discharges directed by the Army or Navy Officer in charge in the interest of plant security will be handled in the following manner: (1) the Officer, or his representative will direct the contractor to suspend the employee in question immediately; (2) the employee will be advised in detail of the specific reasons for his suspension and of his right to a hearing; (3) if requested, a hearing will be held by the Officer, or his representative, within a reasonable period and at such hearing the suspended employee will have an opportunity to produce witnesses and present evidence and to be assisted by counsel; (4) based on such hearing, the Officer, or his representative, will direct the reinstatement (with authority to grant back pay) or the

discharge of such employee; (5) an employee so discharged will have the right, upon request, to have his case reviewed by the War or Navy Department.

6. No agreement between the management and its employees, or their representatives, except those which affect the safety and health of employees, may be entered into, or action taken, which, in the opinion of either the Secretary of War or the Secretary of the Navy, will have the effect of restricting or hampering maximum output.

7. (a) Anti-sabotage, anti-espionage and plant protective measures, including access into the plant, approved or prescribed by the War and Navy Departments, or their representatives, shall be binding upon management, employees, and their representatives.

(b) Measures designed to guard against sabotage, espionage, subversive activities and other plant protective measures which are ordered or approved by the Army or Navy representatives shall insofar as practicable be prominently posted throughout the plant and otherwise made available to employee. Violations of any of these rules or regulations shall be grounds of disciplinary action, including immediate dismissal.

8. (a) The War and Navy Departments in most instances, have contractual responsibility for the approval of all costs including payroll costs. These Departments therefore will from time to time jointly agree upon the policies to govern the exercise of these contractual responsibilities to approve or disapprove proposed wage scales at these plants.

(b) Before operations commence at any plant, the contractor will prepare a wage scale to apply upon the commencement of operations and submit the same for approval

to the War or Navy Department through the local Army or Navy representative at the plant, who will forward these with their own comments regarding the appropriateness of the proposed scale. Any subsequent adjustments in the initial wage scale at any plant shall be worked out by the contractor and the employees through established procedures, provided only that the approval of the War or Navy Department must be obtained before such adjustments may become effective.

9. This statement of policy shall be applicable to all such plants except that where any provision of the statement conflicts with a provision in an existing contract, such contract will not be altered except by mutual consent.

APPENDIX C

COPY

14 June 1944

The Honorable,
The Attorney General.

Attention: Mr. Francis M. Shea.

Dear Mr. Attorney General:

Reference is made to the letter of this Department dated 8 May 1944 relative to actions instituted under the Fair Labor Standards Act of 1938 by employees of cost-plus-a-fixed-fee contractors engaged in the production of Government-owned goods, particularly munitions, in situations where any subsequent interstate or foreign transportation of the goods is effected by the Government.

Several conferences have been held between representatives of the War and Navy Departments with respect to these cases. The difference of opinion which previously existed between the two Departments concerning the policy under which the cases should be handled has been eliminated, and the joint views of the two Departments have been reduced to writing. Inclosed is a copy of a statement of such views.

Sincerely yours,

(signed)

MYRON C. CRAMER
Myron C. Cramer,
Major General
The Judge Advocate General.

1 Incl.: Copy of Stmt.

PRODUCTION OF GOODS FOR COMMERCE

Statement of Army and Navy Views

The War and Navy Departments agree that:

1. A strong argument can be made, supported, among other things, by substantial judicial authority, that the interstate shipment of Government-owned goods by the Government does not constitute "commerce" and the production of war materials, supplies, and equipment by private cost-plus-a-fixed-fee contractors for subsequent interstate or foreign transportation by the Government only does not constitute a "production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. The successful assertion of this argument as a defense in numerous cases, now pending or prospective, against cost-plus-a-fixed-fee contractors, in which the War and Navy Department have a potential aggregate liability which might exceed $75,000,000, may, however, result in an impairment of the jurisdiction of the National Labor Relations Board over war plants or cause a substantial legal doubt to be cast upon such jurisdiction. The defense should be asserted if, in the opinion of the Attorney General, it would not impair or cast substantial legal doubt upon such jurisdiction of the National Labor Relations Board, but it should not be asserted if, in the opinion of the Attorney General, it would result in casting substantial legal doubt upon or impairing such jurisdiction.

3. It is recognized that the National Labor Relations Board regards the shipment of Government-owned goods by the Government as "interstate commerce" within the meaning of the National Labor Relations Act, and desires to be heard, and should be heard, in connection with the policy of the Government's litigation position in cases arising out of the Fair Labor Standards Act.

OFFICE OF THE ATTORNEY GENERAL
Washington, D. C.

July 12, 1944.

The Honorable
The Secretary of War
War Department
Washington, D. C.

My dear Mr. Secretary:

Reference is made to letters dated May 8 and June 14, 1944, from the War Department, letters dated May 8 and June 17, 1944, from the Navy Department, and letters dated June 17 and June 27, 1944, respectively, from the General Counsel of the National Labor Relations Board and the Solicitor of the Department of Labor. This correspondence concerns the applicability of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors engaged in the manufacture and production of war materials for delivery to the Government at the plant site. It has been suggested that it be asserted as a defense in cases involving actions under the Act by such employees that neither the production nor the subsequent interstate transportation of such goods constitute "production of goods for commerce" or "commerce" within the meaning of the Act. The War and Navy Departments' joint statement of views transmitted to this Department following conferences between representatives of the War, Navy, Labor and Justice Departments, recommends the assertion of such defense "if in the opinion of the Attorney General it would not impair or cast substantial legal doubt" upon the jurisdiction of the National Labor Relations Board over war plants. On the other hand, the War and Navy Departments recommend that such defense not be asserted if it would result in impairing or casting substantial legal doubt upon such jurisdiction.

It is my considered opinion that a Supreme Court holding that interstate shipment by the Government of War goods produced by contractors but delivered to the Government before shipment does not constitute "commerce" or "production of goods for commerce" would substantially impair and cast serious legal doubt upon the jurisdiction of the National Labor Relations Board over the labor relations of cost-plus contractors. Both statutes define "commerce" to include "transportation". Nothing in their respective legislative histories evidences a congressional intent to exclude from coverage manufacturers or producers of articles for the Government. Under such circumstances a precedent involving the Fair Labor Standards Act would clearly merit and be accorded great weight in the interpretation of similar questions under the National Labor Relations Act. The Solicitor of the Labor Department and the General Counsel of the National Labor Relations Board concur in this point of view.

You have indicated that you consider it inappropriate to raise this defense in such circumstances and I share your opinion. Entirely apart from that basis of decision, I feel that the defense lacks substantial merit. Despite the possibility of its successful assertion in some lower courts, I do not believe that it would be sustained in the Supreme Court. The statutory definition of "commerce" in the Act covers "trade, commerce, transportation, transmission or communication". I find nothing in the statute which supports the argument that war products are beyond the scope of the statute because they are not designed to enter ordinary competitive commercial channels. The mere fact of transportation provides sufficient basis for coverage. Furthermore, the statutory exemption of persons in employment relationship with the Government is specifically limited by Section 3(d) to persons directly employed by

the United States and cannot reasonably be extended to employees of Government contractors producing materials designed for sale to and subsequent transportation by the Government. Since, if I fairly appraise its weight, the defense will not ultimately serve the Government's financial advantage, the consequences are likely to be only confusion and uncertainty in accounting and the management of labor relations in war plants—a result obviously detrimental to the best interests of the Government. I assume that the decision which has been reached in this matter will be communicated to the field representatives of your Department.

Your Department has already been furnished with copies of Mr. Maggs' views in the matter. In order to complete your files, I am enclosing herewith copy of a letter which I received from the General Counsel of the National Labor Relations Board with respect to his position.

Respectfully,

(sgd) FRANCIS BIDDLE
The Attorney General

COPY

March 26, 1946

The Honorable
The Attorney General

Dear Mr. Attorney General:

Reference is made to the "Memorandum of Agreement on Procedures for Handling Fair Labor Standards Act Claims Against Cost-Plus-a-Fixed-Fee Contractors" which was entered into and executed by the respective parties thereto, including the Department of Justice and the War Department, as of November 1, 1945. The agreement evidenced by that memorandum modified substantially a pre-

vious similar agreement between the same parties, dated December 23, 1943. The purposes of the revised agreement are stated sufficiently in Article 2 of the aforementioned memorandum.

As you know, the revised agreement provides, in substance, that Government counsel will not be furnished to defend claims against cost-plus contractors except in special cases as therein defined. Under the terms of the agreement private counsel has plenary control of the litigation, including full right to settle the litigation, subject to the qualification that it is the duty of private counsel to advise the appropriate United States Attorney of his proposed plan of defense or his proposed course of settlement. If the United States Attorney is satisfied that the proposed plan of defense or course of action of the private attorney represents sound litigating judgment and is in the best interests of the United States, he so advises private counsel and private counsel thereupon proceeds as proposed. If the United States Attorney is not in agreement with the proposed plan of action, he reports to the Department of Justice his recommendation as to whether the Department should seek to participate in the proceedings, a right which the Department expressly reserved.

It has come to the attention of this Department that in several suits of the nature covered by the agreement of November 1, 1945, private counsel, in preparing defense of the litigation, have included in the proposed plan of defense submitted to the appropriate United States Attorney certain defenses which the United States Attorneys do not consider meritorious. Briefly, the defenses in question are that (a) the employees of a cost-plus-a-fixed-fee contractor are not engaged in interstate commerce within the meaning of the Fair Labor Standards Act; (b) the employees of a cost-plus-a-fixed-fee contractor are not engaged in the

production of goods for commerce within the meaning of the Fair Labor Standards Act; (c) a cost-plus-a-fixed-fee contractor operating, in many cases, a Government-owned facility and manufacturing war materials from materials owned and supplied by the Government and for delivery to the Government is acting as an instrumentality of the Government and is not an employer within the meaning of the Fair Labor Standards Act; and (d) defenses which challenge the validity of a regulation of the Wage and Hour Administrator.

As a result of various United States Attorneys advising private counsel of certain contractors that they regard such defenses not to be meritorious, the contractors have pointed out to the War Department that under their contracts with the Department they are required to use their best efforts to protect and subserve the best interests of the United States. They contend that until the United States Supreme Court holds such defenses to be invalid they would not be using their best efforts to protect and subserve the best interests of the United States, as required by their contracts, unless they present to the courts and vigorously prosecute every available defense which to them appears meritorious.

These contractors point out that several trial courts have rendered conflicting rulings regarding the validity of certain of these questioned defenses and they contend that in the event courts of competent jurisdiction should hold subsequently that such defenses are valid a failure to present the defenses in a given case might prejudice whatever rights the contractor would have under his contract to reimbursement for an adverse judgment and expense incident thereto. Contractors insist that if these defenses are not to be raised the War Department through its contracting offices direct the contractors in writing not to present

such defenses and in addition assure them that they will not be precluded thereby from any reimbursement otherwise proper under the contract in the event of an adverse judgment. So far as presently can be estimated the extent of existing suits and potential suits under the Fair Labor Standards Act involving War Department contractors may in the aggregate exceed $250,000,000, substantially all of which will be reimbursable to the contractors. In view of the large amounts involved and the present unsettled state of judicial authority on the matter the War Department is reluctant to direct its contractors to limit their defenses in these actions without the advice of your office.

The question of what defenses should be considered meritorious in suits of the nature considered herein previously was discussed with your office early in 1944 and culminated in a letter dated July 12, 1944, from the Attorney General, replying to previous communications from this Department. In those communications the War Department advised the Attorney General that because of certain considerations connected with the prosecution of the war, more fully recited in letters dated May 8 and June 14, 1944, it had concluded that it would be advisable, if the Attorney General believed that such action would be proper, "to concede in litigated cases that the manufacture of munitions for the Government by employees of cost-plus-a-fixed-fee contractors at Government arsenals constitutes 'the production of goods for commerce' and establishes the basic applicability of the Fair Labor Standards Act to such employees." The Attorney General in his letter dated July 12, 1944, stated that he shared that opinion. He stated further that entirely apart from that basis of decision he felt that the defense lacked substantial merit.

Since that time, however, the policy considerations which it was thought warranted such a conclusion have changed

substantially in view of the termination of hostilities. Also, as indicated above, several trial courts have expressed opinions to the effect that the production of munitions by employees of cost-plus-a-fixed-fee contractors is not "the production of goods for commerce" and, therefore, is not subject to the provisions of the Fair Labor Standards Act. Accordingly, some concern is felt by this Department over the question whether the War Department, as an administrative matter, properly may advise its contractors at this time that the raising of the defenses that employees of a cost-plus-a-fixed-fee contractor are not engaged in commerce or in the production of goods for commerce within the meaning of the Act would not serve the best interests of the United States and accordingly that these defenses should not be raised. The War Department feels that it has a serious obligation to advise its contractors as to their proper course of action in this matter. Accordingly, in view of the substantial change in circumstances since July 1944, the apparent unsettled state of judicial authority on the question, the considerable number of suits with which War Department contractors are and may be faced in this matter and the considerable amount involved in such suits, it is requested that you advise this Department whether the best interests of the Government require the War Department at this time to direct its contractors not to raise these defenses.

The War Department has always felt that the defense that a cost-plus-a-fixed-fee contractor is acting as an instrumentality of the Government and is not an employer within the meaning of the Fair Labor Standards Act is without merit and that defenses which challenge the validity of a regulation of the Wage and Hour Administrator do not subserve the best interests of the Government. Accordingly, the Department proposes, if you concur, to ad-

vise its contractors that the raising of these defenses will not subserve the best interests of the Government and, accordingly, that the Department will not regard as a reasonable and proper cost any part of the counsel fee in cases in which these defenses are introduced.

Sincerely yours,

(sgd) ROBERT P. PATTERSON
Secretary of War.